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89- 1501

No. 89-___

In The

Supreme Court of the United States

October Term, 1989

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, et al.,

Petitioners,

v.

RICHARD B. CHENEY,
SECRETARY OF DEFENSE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Federal employees have standing to enforce a statute and regulations governing a cost comparison of in-house government costs and contractor bids that determines whether Federal employees or contractors will perform commercial activities for the government.

PARTIES TO THE PROCEEDINGS

The National Federation of Federal Employees ("NFFE") is a labor organization which represents approximately 150,000 federal employees. The National Federation of Federal Employees, Local 273 ("NFFE, Local 273") is a chartered local of NFFE which represents a unit of 2,500 employees at Ft. Sill, Oklahoma, including the 462 former employees of the Ft. Sill Directorate of Logistics whose removal is the subject of this litigation. NFFE and NFFE Local 273 were the plaintiffs-appellants in the U.S. Court of Appeals for the District of Columbia Circuit and are petitioners here.

The defendants-appellees below were Secretary of Defense Richard B. Cheney (substituted for Frank C. Carlucci) and then-Secretary of the Army John O. Marsh, Jr., both of whom were named in their official capacities.

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Petitioner National Federation of Federal Employees petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the circuit court is reprinted in the Appendix at pages 1-61. The decision of the district court, *National Federation of Federal Employees v. Carlucci*, No. 88-834 (D.D.C. Aug. 11, 1988) (order granting motion to

dismiss) and the decision of the D.C. Circuit, *National Federation of Federal Employees v. Cheney*, 892 F.2d 98 (D.C. Cir. 1989) (order denying motion for rehearing and suggestion for rehearing *en banc*), are reprinted in the Appendix at pages 71-74 and 62-70, respectively.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on August 25, 1989. The order denying appellant's Motion for a Rehearing and Suggestion for Rehearing *En Banc* was entered December 22, 1989. This Court has jurisdiction to review the judgment of the court below under 28 U.S.C. Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. 96-83, 93 Stat. 648; The National Defense Authorization Act of 1987, Pub. L. 99-661, Sec. 1223(b), 100 Stat. 3972 (codified at 10 U.S.C. Sec. 2304 note (Supp. V 1987)), repealed and recodified Pub. L. 100-370, Sec. 2(a) (1), July 19, 1988, 102 Stat. 851; (codified at 10 U.S.C. 2462(b) (1988)) and the Administrative Procedure Act, 5 U.S.C. Sec. 702 (1982).

This case also involves Executive Order No. 12615, 52 Fed. Reg. 44853 (1987), reprinted in 31 U.S.C. Sec. 501 (Supp. 1989); The Federal Acquisition Regulation, 48 CFR Sec. 7.3 (1988); Office of Management and Budget

Circular A-76. All statutes and regulations are set forth in the appendix with the exception of OMB Circular A-76 which has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

A detailed description of the purpose and history of the government commercial activity program is set forth to properly frame the case for Court review. This description is necessary because the union contends that the D.C. Circuit's decision is based on outdated principles enunciated in statutes and regulations of the 1950s and 1960s while failing to consider the statutory and regulatory framework of the present day commercial activity program.

A. BACKGROUND

1. Commercial Activity Program – Purpose

The federal government's commercial activity program is intended to reduce the cost of government by seeking the least expensive source of commercial services. Examples of government commercial activities are vehicle maintenance, food services and laundry services.

The commercial activity program is set forth in the Office of Management and Budget ("OMB") Circular A-76 (1983 ed.).[1] These procedures determine the least

[1] OMB Circular A-76 was originally issued in 1966 and subsequently was revised in 1967, 1979 and 1983. *See* OMB Circular A-76 (Revised) para. 4.b. (August 4, 1983). The Circular summarized a policy of the Bureau of the Budget developed in Bureau Bulletins issued in 1955, 1957, and 1960. *Id.* The 1983 Circular revision is the focus of this appeal.

expensive source of services by comparing in-house government costs and private contractor bids. Ideally, this cost comparison results in the selection of the least expensive source of service.

Commercial activities presently performed by federal employees must be retained in-house unless a cost comparison indicates a private contractor can accomplish the same quality job at lower cost. For newly proposed commercial activities, an agency must conduct a cost comparison unless in-house performance is not feasible.

The commercial activity program excludes some government functions from performance by the private sector. This exclusion applies to functions so closely related to the public interest that they must continue to be performed by federal employees. Functions excluded from competition with the private sector are referred to as "inherently governmental", *e.g.*, criminal investigation prosecutions, conduct of foreign relations, and direction of intelligence services.

2. Commercial Activity Program – History

When first established in the 1950s, the commercial activity program presumed that private contractors were less expensive than federal employees. This policy has gradually been rescinded, and the modern program makes no presumption of which source is cost effective. Today, the commercial activity program relies on a cost competition between in-house government costs and private contractor bids to determine the cost effective source of commercial services.

The first commercial activity directive, the 1955 Bureau of the Budget Bulletin 55-4, instructed agencies to rely solely on private contractors for commercial services.[2] The 1955 Bulletin permitted exceptions to relying on private contractors only in cases where use of private contractors would not be in the public interest. *See* Government Accounting Office, Federal Productivity: DOD's Experience in Contracting-Out Commercially Available Activities, B-223693 at 10 (Nov. 1988) (hereafter cited as "GAO Report").

In 1967, the commercial activity program introduced competition between in-house government costs and the private contractor bids. Unfortunately, the 1967 commercial activity program lacked guidance on how to conduct a cost comparison. This resulted in each agency or installation applying different cost comparison formulas with mixed results.

In 1974, Congress created the Office of Federal Procurement Policy ("OFPP") within OMB and gave it authority to draft government-wide procurement regulations. Pub. L. 93-400, 88 Stat. 976. In response, the Office of Federal Procurement Policy expanded OMB Circular A-76 and included a uniform cost comparison formula agencies must apply when comparing in-house costs and contractor bids. 44 Fed. Reg. 20559 (1979).

In 1979, Congress amended the OFPPA with instructions to expand the procurement regulations. 1979 U.S.

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[2] Bureau of the Budget Bulletin 55-4 was promulgated pursuant to the Budget and Accounting Act of 1921, as amended 31 U.S.C. Sec. 1 *et seq.*

Code Cong. & Ad. News at 1499-1501; 93 Stat. 648. In response, OFPP incorporated OMB Circular A-76 into the Federal Acquisition Regulations governing government versus contractor performance. 48 CFR Section 7.3 (1988); App. 80.

The current OMB Circular A-76, (1983 ed.), issued pursuant to the OFPPA, substantially improved the competitive position of the in-house government operation when pitted against contractor bids in the cost comparison. The Circular requires agencies to conduct an efficiency study that determines the most efficient in-house organization. Only after maximizing in-house efficiency may an agency calculate the in-house cost placed in competition with the contractor bid. GAO Report at 13.

In 1987, Congress reviewed the effectiveness of OMB Circular A-76. In a note provision of the 1987 National Defense Authorization Act, Congress instructed the Secretary of Defense to ensure cost comparisons were "realistic and fair". Pub. L. 99-661, Sec. 1223, 100 Stat. 3972. To accomplish this objective, the Act elevated the following Circular A-76 costs comparison factors to law: "the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits and all other overhead costs." *Id.* Each of these factors was previously included in the cost comparison formula, and the 1987 Defense Act did not alter the existing cost comparison in OMB Circular A-76 (1983 ed.).[3]

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[3] In 1988, Congress reorganized numerous commercial activity note provisions of the Department of Defense

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In 1987, President Reagan signed Executive Order 12615 (Nov. 1987), which set forth the scope of the current commercial activity program. App. 83. This Executive Order requires all agencies to schedule commercial activity competitions for each of the government commercial activities presently performed by 750,000 federal employees. *See* GAO Report at 28. Agencies must subject no less than 3% of the federal employee positions to the cost competition each year until such time as all federal employee costs have been pitted against contractor performance through the OMB Circular A-76 cost comparison procedure. App. 83.

In November 1988, the Government Accounting Office reported that between 1980 and 1987, the Department of Defense had conducted 78% of all federal government commercial activity studies. GAO Report at 8. In approximately half of the Department of Defense Commercial Activity studies, the cost comparison resulted in a decision to retain federal employee in-house performance. GAO Report at 15

3. Commercial Activity Program: The Government Versus Contractor Cost Competition.

The cost competition of the commercial activity program is a multi-step process resulting in a strictly

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Authorization Acts. The cost comparison provision of the 1987 Act was recodified as "Contracting For Certain Supplies And Services Required When Cost Is Lower", 10 U.S.C. Section 2462 (1988).

regimented cost comparison of in-house cost and contractor bids. The first step of a commercial activity review is to define the performance standards (quality, timeliness, quantity) of the work the commercial activity expects to perform in the future. These standards are incorporated in a written document called the Performance Work Statement ("PWS"). Developing an accurate PWS is critical to the cost study process because it is the basis for determining the in-house cost estimate and contractor bids. GAO Report at 13.

The second step is a government study to determine the most efficient in-house organization ("MEO"). The government next determines the cost to operate the MEO. The Government Accounting Office recently described the MEO performance cost as the "government bid" to perform the commercial activity. GAO Report at 13.

The government solicits bids from the private sector based on the work standards in the PWS. 48 CFR Section 7.302(a)(1)(1988); App. 81. All contractor bids are reviewed and only one is selected as best qualified. This single remaining contractor bid remains in competition for the contract. Finally, in accordance with the strict requirements of OMB Circular A-76, Part IV, a cost comparison is conducted between the remaining contractor bid and the cost of in-house performance. *Id.* at 7.302(a)(2) (1988) App. 81. A tentative award to either in-house or contractor performance is determined by the outcome of the cost comparison formula. *Id.*

Affected parties, including the contractor and federal employees, may file an administrative appeal based

solely on compliance with the cost comparison procedures. *Id.* at Section 7.302(c)(1988); App. 81; OMB Circular A-76, Part I(I)(7) at I-15. The administrative appeal board is appointed by the agency conducting the commercial activity study and must issue its decision within 30 days of receipt of an appeal.

Final award of the commercial activity is made with the completion of the appeal process. If the competition results in an in-house award, the agency must implement the MEO within six months. OMB Circular A-76, Part I(E)(5) at I-12.

B. FEDERAL EMPLOYEE ROLE IN THE COMMERCIAL ACTIVITY PROGRAM

Federal employees play an integral role in preparation of a commercial activity study and the related administrative appeal procedure. The National Defense Authorization Act of 1989 contained a note provision requiring agencies to consult federal employees on a regular basis during preparation of two crucial documents that control the eventual cost of in-house operation. Pub. L. 100-998, Sec. 33, repealed and recodified Pub. L. 100-456, Sec. 331(a), 102 Stat. 1957 (codified at 10 U.S.C. Section 2467(a) 1988) (hereafter "Cost Comparison Act"). Additionally, if a cost comparison results in a contractor award, federal employees have standing to challenge the award in the administrative appeal procedure. 48 CFR Section 7.307 (1988); OMB Circular A-76, Part I, I(7).

1. Preparation of Performance Work Statement

The Cost Comparison Act requires agencies to consult regularly with federal employees during preparation of the Performance Work Statement ("PWS"). 10 U.S.C. Section 2467(b) (1) (A). The PWS establishes the standards of work on which contractors base their bids. The legislative history indicates Congress added this requirement due to frequent omissions in the PWS of the work to be performed. 134 Cong. Rec. H2714-15, April 29, 1988 (Statement of Rep. Skelton). Congress concluded that the omissions resulted in under-bids by contractors and multi-million dollar cost overruns when contractors were required to perform the work omitted from the PWS. *Id.* Regular consultation with federal employees is designed to ensure that all work being studied is reflected in the PWS. *Id.* In urging passage of the Cost Comparison Act, Rep. Skelton stated that federal employees would be motivated to ensure that the PWS is complete because it would guarantee that contractor and in-house costs would be based on the same work standards. *Id.* at H2715.

2. Preparation of Most Efficient Organization

The Cost Comparison Act also requires that agencies regularly consult federal employees during preparation of the Most Efficient Organization. 10 U.S.C. Section 2467(b) (1) (A). The MEO is the end result of the in-house cost efficiency study conducted during a commercial activity study. OMB Circular A-76, Part I(E) (1) at I-12. The cost of performing the MEO is the "government's bid"

compared against the contractor bid in the cost comparison process. GAO Report at 13. The commercial activity regulations require the MEO to remain confidential during its preparation to prevent disclosure to competing contractors. Nevertheless, an agency must solicit efficiency suggestions from the federal employees. OMB Circular A-76, Part I(E) (2) at I-12. Federal employees performing an activity are ideally situated to recommend and implement efficiency improvements. When urging passage of the Cost Comparison Act, Rep. Skelton recognized that Federal employees would be motivated to make efficiency recommendations because, without a competitive MEO, a private contractor will replace the federal employees. 134 Cong. Rec. H2714-15, April 29, 1988.

3. Administrative Appeal Procedure

OMB Circular A-76 (1983 ed.) was promulgated pursuant to the Office of Federal Procurement Policy Act, 1979 Amendment, which required the Office of Federal Procurement Policy to promulgate efficiency regulations and to "promote fair dealings and equitable relationships among the parties in Government contracting." Pub. L. 96-83, Sec. 2(12); 93 Stat. 648. In response, OMB Circular A-76 was amended to include the designation of federal employees as "affected parties", with standing to appeal violations of the cost comparison through the administrative appeals procedure. OMB Circular A-76, Para. 6(g) (affected parties); OMB Circular A-76, Part I, I(7) at I-14 (administrative appeal procedure). The Appeals Board jurisdiction is limited to reviewing compliance with the

cost comparison formula and the Board must issue decisions within 30 days of receipt of an appeal. 48 CFR Section 7.307 (1988). An administrative appeal outside the agency conducting the commercial activity study is prohibited. OMB Circular A-76, Part I, I(2) & (3) at I-15.[4] The federal employees in the instant case completed the administrative appeal procedure prior to seeking judicial relief.

PROCEEDINGS BELOW

A. Facts

In 1980, the U.S. Army Training and Doctrine Command ("TRADOC") directed the Army Fort Sill Directorate of Resource Management to conduct a commercial activity review of the Fort Sill Directorate of Logistics ("DOL"). The Directorate of Logistics provides support, maintenance, transportation and supply functions for Fort Sill, Oklahoma and surrounding installations. In May 1987, after a seven year commercial activity study, a cost comparison resulted in a tentative award of the DOL function to a private contractor. The union appealed multiple violations of the cost comparison through the administrative appeals procedure. Among the violations raised in the appeal were inflation of the in-house cost,

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[4] However, the Federal Labor relations Authority has held that the cost-comparison and other mandatory aspects of the commercial activity program are subject to grievance/arbitration. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas v. American Federation of Government Employees, Local 2840*, 22 FLRA 656 (1986); *See also Department of the Treasury. I.R.S. v. FLRA*, 862 F.2d 880 (D.C. Cir. 1988), *cert. granted*, 58 U.S.L.W. 3212 (U.S. Oct. 2, 1989) (No. 88-2123).

artificially high overhead and support costs, and an improper calculation of private contractor conversion costs and profit provisions. The Army administrative appeal board granted portions of the union appeal but concluded that the changes in the cost comparison were insufficient to overturn the award to the private contractor.

B. U.S. District Court for the District of Columbia

On March 29, 1988, the union sought injunctive and declaratory relief in the United States District Court for the District of Columbia to halt the Army's planned conversion to contractor performance on October 1, 1988. The union case relied on the many Army violations of both OMB Circular A-76 and the cost comparison provisions of the 1987 Defense Authorization Act. In dismissing the case, the U.S. District Court held that federal employees lacked standing to enforce either OMB Circular A-76 or the cost comparison provisions of the Defense Act.

C. U.S. Court of Appeals for the District of Columbia Circuit Panel Decision

A panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld the District Court, finding that federal employees were not within the zone of interest of the statutes relied upon. The court reviewed the legislative history of the Office of Federal Procurement Policy Act of 1979 and the Budget and Accounting Act of 1921, as amended, and concluded it was Congress' intent to promote federal government efficiency. Additionally, the Court concluded that the Office of Federal Procurement Policy Act, 1979 Amendment, and the 1987 National

Defense Authorization Act required agencies to rely on the private sector for commercial services. App. 28 & 31.

Thus, in the court's view, Congress had not contemplated reliance on federal employees to challenge agency violations of these efficiency related statutes. App. 28 & 31. Furthermore, the court found that the interest of federal employees in continued employment is in conflict with an efficient government. App. 28 & 31. Therefore, federal employees could not be within the zone of interest of statutes which relied on private contractors for the services presently performed by federal employees. App. 28 & 31. The majority concluded that the interest of federal employees in seeing that agencies comply with the procurement regulations was no different than that of the general public. App. 33.

In a vigorous and lengthy dissent, Judge Mikva criticized the majority for disregarding the Supreme Court's zone of interest test and for misreading the legislative history. App. 53-56. Judge Mikva concluded that the plain language of the statutes and regulations demonstrated Congress' intent that the comparison of in-house government and contractor costs result in the selection of the least expensive source of commercial government services. App. 57-58. This bottom line approach favors the source that is least expensive. As Judge Mikva pointed out, the only way a federal employee performing a commercial activity will retain employment is by assisting the agency to reach cost efficiency. App. 49-50. Judge Mikva identified decisions of the Supreme Court holding that business interests in profits bring a party within the zone of interest of a statute when pursuit of profits result in furtherance of the congressional purpose. *See Investment*

Company Institute v. Camp, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); App. 43. Judge Mikva found no difference between a federal employee's interest in wages and a company's interest in profits. App. 43-44.

D. Order and Statement Denying Rehearing or Review En Banc

Three days prior to issuance of the panel's decision in the instant case, the D.C. Circuit issued *C.C. Distributors v. U.S.*, 883 F.2d 146 (D.C. Cir. 1989) in which the court held private contractors have standing under the 1987 Defense Authorization Act to enforce an OMB Circular A-76 cost comparison. On the basis of the conflict between these decisions, the union filed a Motion for Rehearing or Suggestion for Review *En Banc*. The court denied the union motion and reiterated that the interest of federal employees in continued government employment conflicts with the efficiency goals of Congress. App. 66. The court also stated that federal employee interest in a fair procurement procedure was no different than the interest of the general public. App. 65.

Judge Mikva dissented and, in a statement joined by Chief Judge Wald and Judge Edwards, criticized the court's decision as a "perverse use of the standing doctrine." App. 70. The dissent observed that the legislative goals of efficiency and economy would be promoted only when the least expensive source of services was obtained. App. 67. The dissent reiterated that the plain language of the statute indicated neutrality between federal employee

and contractor performance. App. 67. The dissent also accused the majority of manufacturing a preference for private contractors through a selective reading of the legislative history. App. 69.

REASONS FOR GRANTING THE PETITION

A. Introduction

The federal government commercial activity program is a multi-billion dollar activity. Taken together, the statutes governing the commercial activity program constitute an unequivocal order to reduce costs by achieving commercial activity cost efficiency. Congress' instructions, in the Budget & Accounting Act of 1921, as amended, 31 U.S.C. Section 1 *et seq.*, and in the Office of Federal Procurement Policy Act, as amended, 41 U.S.C. Section 401 *et seq.*, constitute a general command to improve efficiency. These statutes delegated authority, first to the Bureau of the Budget, and later to its successor, the Office of Management and Budget, to create a regulatory scheme that promotes procurement efficiency. Pub. L. 96-83, Sec. 649, 93 Stat. 649 App. 75-77. More recently, Congress endorsed the efficiency mechanism created by the Office of Management and Budget when it incorporated portions of the OMB Circular A76 cost comparison in a note provision of the 1987 National Defense Authorization Act. Pub. L. 99-661 Section 1223(b), 100 Stat. 3977 (codified at 10 U.S.C. Section 2304 note (Supp. V 1987)); repealed by Pub. L. 100-370, Section 2(a)(1), (recodified at 10 U.S.C. Section 2462(b) (1988)).

The Circuit Court's decision in the instant case, and in the related decision, *C.C. Distributors v. U.S.*, 883 F.2d 146 (D.C. Cir. 1989), created case law that frustrates rather than furthers the efficiency purposes of the OFPPA, the Budget and Accounting Act, and the 1987 Defense Authorization Act. The defeat of the Office of Management and Budget commercial activity efficiency procedures will become apparent over the next several years as the executive branch implements Executive Order 12615 (Nov. 1987). Pursuant to this Executive Order, agencies will conduct cost studies of the commercial activities presently performed by 750,000 federal employees. In studies where an agency underestimates in-house costs, the contractors will have standing to file an administrative appeal and if the error is not corrected, the contractors may seek judicial relief. However, in commercial activity studies that underestimate contractor performance, federal employees will have standing only in an administrative appeal forum within the very agency that has violated the commercial activity regulations. In effect, contractors have access to the power of the courts to correct agency violations of law, but federal employees are left without a neutral forum even when facing the elimination of their jobs. This is clearly not what Congress intended when it passed legislation requiring that federal employees be regularly consulted throughout each step of the commercial activity study to ensure agency compliance with commercial activity regulations.

B. Analysis

The D.C. Circuit has disregarded this Court's precedent by denying the union standing under the Office of

Federal Procurement Policy Act of 1979 and the 1987 National Defense Authorization Act to enforce the cost comparison provisions of OMB Circular A-76.[5]

The law of standing is based on a set of constitutional and prudential requirements. To establish standing under Article III of the Constitution, a litigant must plead an injury in fact fairly traceable to the conduct complained of and likely to be redressed by the relief request. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Prudential standing requires that the "plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (footnote omitted)). The District Court concluded that the union satisfied the constitutional requirement for standing on the basis that private contractor performance of the Army Fort Sill Directorate of Logistics resulted in terminations, demotions, transfers and forced early retirement for the existing federal employee workforce. Injury to the employees would have been

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[5] The union asserted standing under the OFPPA and the 1987 Defense Authorization Act throughout this litigation but did not assert standing under the Budget & Accounting Act of 1921. The D.C. Circuit *sua sponte* reached the issue of union standing under the Budget and Accounting Act of 1921. Nevertheless, the OFPPA, 1987 Defense Act and the Budget and Accounting Act of 1921, as amended, all mandate procurement efficiency and the arguments presented herein on the OFFPA and 1987 Defense Act apply with equal force to the Budget and Accounting Act.

prevented by the granting of declaratory and injunctive relief. Partial relief remains available though reinstatement and backpay pursuant to the Backpay Act, 5 U.S.C. Section 5596.

C. Prudential Standing: Zone-of-Interest

The union asserted standing pursuant to Section 702 of the APA, which grants standing to a person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. Section 702 (1982).

In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987), the Court acknowledged that the zone-of-interest test is a gloss on section 702 of the APA and provides some limits on access to the courts. *Id.* at 396. However, the Court emphasized in *Clarke* that "[t]he test is not meant to be especially demanding, in particular, there need be no indication of a congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400. The Court's test for zone-of-interest is satisfied by a mere "plausible relationship" between the interests propounded by the plaintiff and the policies undergirding the statutory framework. *Id.* at 396, 399, 403. In *Clarke*, the Court reaffirmed the presumption in favor of judicial review, concluding that would-be plaintiffs should be allowed into court unless they are "not even 'arguably within the zone-of-interests to be protected or regulated by the statute.' " *Id.* at 397 (quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

In cases where the would-be plaintiff is not the expressed subject of the contested statute, the zone-of-interest test denies standing only if "the plaintiff interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit." *Clarke*, 479 U.S. at 399.

D. D.C. Circuit Decision

The D.C. Circuit ignored the relaxed requirement for standing expressed by this Court in *Clarke* by denying union standing under the Office of Federal Procurement Policy Act of 1979 ("OFPPA") and the 1987 National Defense Authorization Act ("Defense Act"). The D.C. Circuit's decision is based on an erroneous interpretation of the federal employees' role in the commercial activity program and a misapplication of this Court's instructions on the zone-of-interest test.

1) Contrary to the D.C. Circuit finding, the statutory and regulatory schemes are replete with evidence that Congress considered federal employees a critical component of the commercial activity program. Significantly, agencies are required by statute to consult with federal employees at each of the critical steps in a commercial activity program. 10 U.S.C. Section 2467(b) (1988).[6]

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[6] The 1989 National Defense Authorization Act, Pub. L. 100-989, Sec. 331, contained the provision integrating federal employees into the OMB Circular A-76 procedures. This statutory provision was repealed during the next sesion of Congress during a reorganization of the commercial activity statutory

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Federal employees must be regularly consulted during preparation of the work standards on which all in-house bids and contractor bids are based. *Id.* Again, federal employees must be consulted during construction of the efficiency study that constitutes the government bid for the commercial activity. *Id.* The legislative history is as brief as it is clear. *See* 134 Cong. Rec. H2714, April 29, 1988 (Statement of Rep. Skelton). Congress determined that federal employees were highly motivated to police agency compliance with the commercial activity regulations and brought them into the process accordingly. *Id.* If Congress had concluded that federal employees' interests were in conflict with government efficiency, Congress would have deleted federal employees from the administrative appeal procedures of OMB Circular A-76. *See* J. Mikva's dissent, App. 54. Instead, Congress enacted legislation integrating federal employees into each critical step of the commercial activity procedures.

Additionally, Congress amended the OMB Circular A-76 cost comparison components with the Cost Comparison Act to include the retirement costs of both contractors and federal employees. 10 U.S.C. Sec. 2467(a) (1988).

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provisions and recodified as "Cost Comparisons: requirement with respect to retirement costs and consultation with employees." Pub. L. 100-456, Sec. 331(a), 102 Stat. 1957 (codified at 10 U.S.C. Sec. 2467 (1988)). The Court may consider the 1989 National Defense Authorization Act cost comparison provision when determining whether federal employees are within the zone-of-interest of the Office of Federal Procurement Policy Act and the 1987 National Defense Authorization Act. *See Association of Data Processing, Inc. v. Camp*, 397 U.S. 150, 155-56 (1970); *Clarke v. Securities Industry Association*, 479 U.S. 388, 396-97 (1987).

The legislative history indicates that Congress found the absence of retirement costs in the OMB Circular A-76 procedure resulted in "faulty" cost comparisons which sometimes resulted in erroneous awards to contractors. 134 Cong. Rec. H2714, April 29, 1988 (Statement of Rep. Skelton). In fact, the cost study at Fort Sill was cited by Rep. Skelton as an example of a faulty cost comparison. *Id.* In dismissing the union's case, the D.C. Circuit ignored Congressional action expressly passed to improve the position of federal employees in the OMB Circular A-76 cost comparison.

2) The D.C. Circuit interpreted federal employee interest in continued employment as conflicting with government efficiency. App. 28 & 31. To the contrary, the administrative scheme makes the federal employee interest in continued employment inseparable from efficiency in government. Executive Order No. 12615 requires agencies to schedule each federal employee position for a cost competition. *Id.* Section I(d), App. 84. Federal employees intent on maintaining employment in a commercial activity will be highly motivated to ensure an accurate PWS and an ideal MEO. Only with accurate and efficient in-house operations will a commercial activity be retained in-house. Employee failure to ensure in-house efficiency will result in a loss of employment to a contractor through the OMB Circular A-76 cost comparison. This administrative scheme ensures that all federal employees interested in continued employment, by necessity, have an interest in government efficiency.

Moreover, federal employees are the only available plaintiff to correct an agency underestimate of contractor costs. If an agency accepts an underestimate of the cost of

contractor performance, the contractor will not protest and the agency will not sue itself to correct the error. There are no advocates in the process other than the federal employees who have an interest in ensuring compliance with the regulatory procedures that prohibit an underestimate of contractor costs. See J. Mikva's dissent, App. 50.

3) The D.C. Circuit's conclusion that the 1987 Defense Act favored contractor performance is based on a selective reading of the legislative history and conflicts with the plain language of the Act. While the legislative history suggests that some members of Congress favored private contractors, the actual language of the relevant statutes favors neither contractors nor federal employees. The 1987 Defense Authorization Act requires agencies to conduct "realistic and fair" cost comparisons. 10 U.S.C. Section 2304 note, App. 75. This straightforward language certainly does not suggest a bias toward contractors. Nothing in this brief statutory provision suggests federal employees should be cast aside regardless of in-house or contractor costs. The OFPPA is equally neutral. This Act declares that it is the policy of Congress to promote efficiency and does not designate a priority other than cost effectiveness. Pub. L. 96-83, Sec. 12, App. 78.

In dissent, Judge Mikva responds to the panel's statutory analysis by stating:

> If Congress wanted to establish a presumption that the private sector is always more economical than the government, why did it continue to permit time consuming, lengthy cost comparisons before each and every contracting decision? If Congress favored the private sector, why did it not require the government to use

> private enterprise for every function which is not "inherently governmental in nature"? The reason Congress acquiesced in OMB's provider-neutral decision-making strategy is that its interest was, first and last, in saving money – an interest which [the union's] suit is not only consistent with but promotes.

NFFE v. Cheney, No. 88-834 (D.C. Cir. Aug. 25, 1989) (Mikva, J., dissenting). App. 54.

4) Finally, the D.C. Circuit charged that a federal employee's interest in continued employment is neither marginally related to nor consistent with the goals of Congress. This conclusion is wholly at odds with the Supreme Court's decisions in Administrative Procedure Act zone-of-interest cases.

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 156-58 (1970), the first zone-of-interest case, the Court held that the plaintiffs' interest in profits was more than marginally related to the Congressional purposes for enacting a statute restricting banking activities. The Court concluded that the business interest in profits provided sufficient motivation to place the data processing companies within the zone-of-interest necessary to enforce the bank laws. *Id.* Similarly, in *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), this Court held that travel agents in competition with banks offering non-traditional bank services satisfied the zone-of-interest test for standing to enforce restrictive regulatory bank laws. In *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("ICI"), the Court held that an interest in profits was sufficient to confer standing on a securities industry group seeking to challenge regulations permitting banks to enter the securities field. Subsequently in *Clarke*, the

Court made clear that the zone-of-interest test was not meant to be especially difficult. 479 U.S. at 399. In *Clarke*, the Court held that a discount broker's interest in profits was sufficient for standing to assert the public interest in restricting bank activities. *Id.* at 403.[7]

This Court has consistently held a corporation's interest in profits may be sufficient to bring a plaintiff within the zone-of-interest of a regulatory statute. Certainly there is no difference between a corporation's interest in profits and an employees interest in a job. Both are necessary for continued economic existence.

CONCLUSION

The D.C. Circuit did not address statutes and legislative history indicating the critical role played by valuable federal employees in achieving compliance with the commercial activity regulations. Instead, the D.C. Circuit has

[7] In *Clarke*, this Court also emphasized the importance of whether the plaintiff would constitute a reliable attorney general for litigating the issues of the public interest. *Clarke*, 479 U.S. at 397 n.12. Here, federal employees are highly motivated to perform the function of a private attorney general when an agency underestimates contractor performance. Enforcement of the regulations requiring an accurate cost comparison furthers the federal employees economic interest in continued employment at the same time advances the congressional goal of procurement efficiency. The decision below has the unfortunate effect of denying the public any advocate to fulfill the private attorney general's role when an agency underestimates contractor performance. The Circuit Court's decision is inconsistent with Supreme Court precedent and defeats the Congressional goal of procurement efficiency.

essentially looked past the federal employees' role in the process and considered only the employees subjective interest in continued employment. In effect, the D.C. Circuit test for the zone-of-interest requires an *a priori* showing of no possible conflicts with the statute a plaintiff relies upon. The Circuit Court's application of the zone-of-interest test ignores this Court's instruction that the test "is not meant to be especially demanding." Moreover, the decision reconstitutes the D.C. Circuit's restrictive zone-of-interest test overturned in *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 400 n. 15 (1987).

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 2, 1989 Decided August 25, 1989

No. 88-5271

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al.,

APPELLANTS

v.

RICHARD B. CHENEY, Secretary of Defense, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 88-00834)

Joshua F. Bowers, with whom H. Stephan Gordon was on the brief, for appellants.

Nathan Dodell, Assistant United States Attorney, with whom Jay B. Stephens, United States Attorney, John D. Bates, and R. Craig Lawrence, Assistant United States Attorney, were on the brief, for appellees.

Before MIKVA, SILBERMAN and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Circuit Judge MIKVA.

SENTELLE, Circuit Judge: Appellants, the National Federation of Federal Employees and Local 273 of the National Federation of Federal Employees (collectively "appellants" or "NFFE"), contest a United States Army decision to "contract out" to private contractors the services formerly provided by government employees of the Directorate of Logistics, Fort Sill, Oklahoma. The District Court held from the bench: (1) that NFFE, pursuant to

section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. Section 702 (1982), lacked standing to sue under either Office of Management and Budget ("OMB") Circular A-76 (Revised) or section 1223(b) of the National Defense Authorization Act of 1987 ("1987 DoD Authorization Act")[1]; and (2) that administrative decisions to contract out are not subject to judicial review under the APA, 5 U.S.C. Section 701(a). We affirm the District Court's holding that NFFE lacks standing to bring this action and therefore find it unnecessary to address the reviewability of contracting out decisions.

I. BACKGROUND

Under OMB guidelines, government agencies must determine "whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." OMB Circular A-76 (Revised) para. 1 (August 4, 1983) ("OMB Circular A-76").[2] In 1980, the U.S. Army Training and Doctrine Command ("TRADOC"), pursuant to the Circular, directed the Fort Sill Directorate of Resources Management ("Fort Sill") to conduct a commercial activity review of the Fort Sill Directorate of Logistics. The

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[1] Pub. L. No. 99-661, Section 1223(b), 100 Stat. 3972 (codified at 10 U.S.C. Section 2304 note (Supp. V 1987)).

[2] OMB Circular A-76 was originally issued in 1966 and subsequently was revised in 1967, 1979, and 1983. *See* OMB Circular A-76 (Revised) para. 4.b. (August 4, 1983). The Circular summarized a policy of the Bureau of the Budget developed in Bureau Bulletins issued in 1955, 1957, and 1960. *Id.* The 1983 Circular revision is the focus of this appeal.

Directorate of Logistics provides support, maintenance, transportation, and supply functions for Fort Sill and surrounding installations. It also operates and maintains a fleet of 500 government vehicles.

Over the next four years, Fort Sill conducted an extensive examination of the responsibilities of the Directorate of Logistics, separating "commercial" and "governmental" activities and formulating all the commercial activities into a Performance Work Standard ("PWS") for a projected five-year contract term. Fort Sill then determined the in-house Most Efficient Organization ("MEO") costs based upon the PWS. With this estimate as a baseline, and with other appropriate adjustments,[3] in November 1984, Fort Sill issued a solicitation for bids, referred to as a Request for Proposals ("RFP"), from private contractors to provide the services at that time provided by the Directorate of Logistics based on the same PWS used for the in-house estimate.

In response to the RFP, in May 1986, Fort Sill received eight contractor proposals, all of which were evaluated by an Army Source Selection Evaluation Board ("Evaluation Board"). As is typical in government contracting, the Evaluation Board met with officials from the eight contractors for "discussions" regarding improvements on their proposals. After these discussions, Fort Sill resolicited bids seeking the contractors' best and final offers ("bafos"). The bafo proposals were received in July 1986.

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[3] Most significantly, OMB Circular A-76 requires a ten percent conversion differential be added to contracting costs.

In August, the OMB revised its policy regarding calculation of retirement costs for in-house estimates. Likewise in February 1987, the method of determining costs of a contractors' social security and thrift plan contributions was revised. Based on these changes, TRADOC solicited a second round of bafo bids. All second round bafo proposals were audited by the Defense Contract Audit Agency.

In May of 1987, the Evaluation Board selected the proposal submitted by Northrup Worldwide Aircraft Services, Inc. ("Northrup"). In June, Fort Sill compared the selected Northrup proposal, estimated at $53.2 million over the five-year term, with the in-house MEO estimate of $61.4 million over the same period. After TRADOC approval of the selection, Fort Sill announced tentatively an award of the contract to Northrup, which necessarily would result in termination of in-house services.

Pursuant to federal and Army acquisition regulations and OMB Circular A-76, an administrative appeal period ran from June 10 to July 22. During the period NFFE directly and through its members appealed the award, alleging several violations of the OMB Circular A-76 Cost Comparison Handbook, including, *inter alia*, inflated in-house employee performance costs, artificially high overhead and support costs,[4] and improperly calculated private contractor conversion costs and profit

[4] TRADOC received, *inter alia*, 330 letters of concern from the NFFE and Directorate of Logistics employees and another 1,131 letters of concern from non-Directorate employees. Joint Appendix ("J.A.") at 338-39.

provisions.[5] An Army Administrative Appeals Review Board ("Review Board") consolidated the allegations into eleven appeals and in a fifty-four page decision letter specifically addressed each of fifty-nine allegations, denying most, partially substantiating two, and fully substantiating two others. Administrative App. Rev. Bd., Solic. No. DABT39-85-R-0001, Report of Proceedings, para. 2.b. (August 7, 1987) (J.A. at 338, 339). The Review Board concluded that the "directed changes were not enough to alter the announced result of the cost comparison or to reverse the initial decision to contract out." *Id.* para. 4.b. (J.A. at 391).

The Government Accounting Office ("GAO"), pursuant to a congressional request, also reviewed the Fort Sill contracting out decision. Based on the conclusions of that review, on December 4, 1987, the Department of the Army directed TRADOC to negotiate a contract change with Northrup to correct a defect in the award fee provision. After completion of this correction, on March 15, 1988, Fort Sill received final approval to award the contract to Northrup, with performance scheduled to begin on October 1, 1988.

Appellants then filed this suit alleging, *inter alia*, that Fort Sill, in its contracting out decision, violated the cost

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[5] Local 273 of the NFFE also filed a collective bargaining grievance with Fort Sill. *See* J.A. at 508. At oral argument before this Court, appellants advised that the grievance had been withdrawn. Additionally, several union member employees filed a bid protest with the General Accounting Office under the Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (codified in various sections of Titles 10 and 41 U.S.C., *see* J.A. at 512).

comparison procedures set forth in OMB Circular A-76 and the requirements of section 1223(b) of the 1987 DoD Authorization Act.[6] Appellants sought injunctive and other relief as necessary and proper.[7]

Appellees moved to dismiss. The District Court granted appellees' motion from the bench, holding that (1) under section 702 of the APA and the "zone of interest test" appellants lacked standing to sue; and (2) under 5 U.S.C. Section 701(a) the contracting out decision was not subject to judicial review under either the Circular or the 1987 DoD Authorization Act, as the former commits the decision to nonreviewable agency discretion and the

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[6] Section 1223(b) provides:

> For the purpose of determining whether to contract with a source in the private sector for the performance of any Department of Defense function on the basis of a comparison of the costs of procuring supplies or services from such a source with the costs of providing the same supplies or service by the Department of Defense, the Secretary of Defense shall ensure that all costs considered, including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs, are realistic and fair.

10 U.S.C. Section 2304 note.

[7] Appellants also argued that a Northrup employee's conflict of interest arising from his prior employment with the Army, where he allegedly had some involvement in this contracting out decision, should void the award. Because appellants failed to raise this allegation in their complaint before the District Court, the issue was not before that Court and therefore is not properly before us.

latter fails to provide any law or ascertainable standards to apply. Transcript of Hearing, *National Federation of Federal Employees v. Carlucci* at 2-3 (D.D.C. Aug. 10, 1988), J.A. at 8-9. On Appeal, appellants seek reversal of the District Court's decision on standing and remand for adjudication on the merits.

II. ANALYSIS

A. APA Standing: The Zone of Interest of the Relevant Statutes.

A party must have standing to bring suit in federal court. A court may "refuse to determine the merits of a legal claim, on the ground that even though the claim may be correct the litigant advancing it is not properly situated to be entitled to its judicial determination." 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE Section 3531, at 338-39 (1984). Standing focuses on the party and not on the issues sought to be adjudicated. *See Flast v. Cohen*, 392 U.S. 83, 99 (1968). The requirements of standing are generally separated into two categories: the constitutional requirements of Article III[8] and the prudential requirements

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[8] Article III requires an actual "Case[]" or "Controvers[y]" for standing. U.S. CONST. art. III, section 2 cl. 1. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the Supreme Court wrote that "at an irreducible minimum" this equates to an " '[1] actual or threatened injury as a result of the putatively illegal conduct of the defendant' . . . '[2] fairly . . . trace[able] to the challenged action' and . . . '[3] likely . . . redress[able] by a favorable decision." *Id.* at 472 (citations omitted). Thus injury without

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crafted by the Judiciary. *See generally, Center for Auto Safety v. National Highway Traffic Safety Administration*, 793 F.2d 1322, 1328-38 (D.C. Cir. 1986). Prudential standing requires that the "plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982) (quoting *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970) (footnote omitted).

In the instant case, appellants assert standing under section 702 of the APA. That section provides standing to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a *relevant statute*." 5 U.S.C. Section 702 (emphasis added). Section 702 and the prudential zone of interest test are intimately related – the former provides a statutory grant from Congress to an aggrieved party to contest agency action and the latter provides a judicial limitation necessary to ensure that the proper party is asserting the claim against the agency. As the

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traceability and redressability does not satisfy Article III. *See National Maritime Union of America v. Commander, Military Sealift Command*, 824 F.2d 1228, 1235 (D.C. Cir. 1987) (government contractor's employees' "loss of present or future jobs" as a result of contract award to other contractor constituted economic injury but was "neither fairly traceable to the putatively illegal omission of a wage determination [under the Contract Services Act] . . . nor fairly redressable by the remedy [sought]"). Because we hold that appellants lacks standing on zone of interest grounds, we find it unnecessary to determine if appellants in fact suffered a traceable and redressable injury.

Supreme Court has stated, the zone of interest test is "most usefully understood as a gloss on the meaning of [section] 702," particularly since the "principal cases in which the . . . test has been applied are those involving claims under the APA." *Clarke v. Securities Industry Association*, 479 U.S. 388, 400 n.16 (1987).

Thus, we are required to determine whether appellants' interests bring them within "that class of 'aggrieved' persons . . . entitled to judicial review of 'agency action.' " *Association of Data Processing*, 397 U.S. at 157, by the "relevant statute[s]," 5 U.S.C. Section 702, under which the agency acted, thereby conferring upon appellants standing to sue. The statutes under which appellants assert standing are (1) the two statutes under which OMB Circular A-76 is purported to be authorized, the Budget and Accounting Act of 1921, as amended, [9] and the Office of Federal Procurement Policy Act Amendments of 1979,[10] *see* OMB Circular A-76 para. 3 (J.A. at 12); and (2) section 1223(b) of the 1987 DoD Authorization Act, 10 U.S.C. Section 2304 note, requiring a "realistic and fair" cost comparison in a decision to contract out.[11]

In Clarke, the most recent and leading Supreme Court statement on the zone of interest test, Justice White, writing for the Court, explained that

> [t]he zone of interest test is a guide for deciding whether, in view of Congress' evident intent to

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[9] Act of June 10, 1921, ch. 18, 42 Stat. 20 (1921) (codified at 31 U.S.C. Section 1 et seq.).

[10] Pub. L. No. 96-83, 93 Stat. 648 (1979) (codified at 41 U.S.C. Section 401 et seq.).

[11] *See supra* note 6.

> make agency decision presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency action. In cases where the plaintiff is not itself the subject of the contested . . . action, the test denies a right of review if the plaintiff's interests are *so marginally related to or inconsistent with the purposes implicit in the [relevant] statute* that it cannot reasonably be assumed that Congress intended to permit the suit.

479 U.S. at 399 (emphasis added). *Clarke* held that the interest of the Securities Industry Association, a trade Association representing securities dealers, was "plausibl[y] relat[ed] to the policies underlying . . . the National Bank Act," and therefore the Association had standing under that Act to contest an action of the Comptroller of the Currency. *Id.* at 403.

The Court noted that the "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400 (footnote and citation omitted). The *Clarke* Court expressly rejected earlier lower court suggestions that the zone of interest test requires "indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 400 n.15 (citing *Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981)). Instead, the *Clarke* formulation of the zone of interest test requires that we deny standing only if appellants' interest is no more than marginally related to or in fact inconsistent with the implicit purposes of the relevant statute. If, after reviewing the relevant statute and its legislative history, we conclude that appellants' interests are consistent with and more than marginally related to the purposes of the relevant

statute, appellants have standing to contest an agency action under section 702.

Before undertaking our zone of interest inquiry, we must address the parties' fundamental misunderstanding of the relevant question. The issue is *not* whether appellants' interests are within the zone of interest of OMB Circular A-76; section 702 clearly requires that the party seeking relief be "legal[ly] wrong[ed] . . . , or adversely affected or aggrieved . . . within the meaning of a *relevant statute.*" 5 U.S.C. Section 702 (emphasis added). The Circular is not a statute, *see, e.g.*, Ketler, *Federal Employee Challenges to Contracting Out: Is There a Viable Forum?*, 111 MILITARY L. REV. 103, 110 (1986) ("Circular A-76 promulgates executive branch managerial policy"), and, although promulgated pursuant to congressional authority, the Circular itself cannot grant standing. In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Supreme Court stated that where a dispute is otherwise justifiable by an Article III federal court[12] under section 702 of the APA, "the

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[12] We emphasize that we are here concerned with Article III standing, not standing before an Article I administrative tribunal, *see, e.g., American Trucking Association v. ICC*, 673 F.2d 82, 85 n.4. (5th Cir.), *cert. denied*, 460 U.S. 1022 (1982); *Ecee, Inc. v. FERC*, 645 F.2d 339, 349-50 (5th Cir. 1981); *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 605-08 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978), or with a situation in which an agency has granted administrative standing and failed to adhere to that grant. *See Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976). In fact, NFFE and 1,500 of its members asserted administrative standing and appealed the contracting out decision to the Army Review Board. *See* J.A. at 338-39. The Review Board apparently granted standing, as it concluded on the merits that some improprieties required minor changes. Administrative App. Rev. Bd., *supra*, at para. 4.b. J.A. at 391.

question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine." *Id.* at 732 & n.3 (quoting *Flast v. Cohen*, 392 U.S. at 100, other citations omitted). *See also Association of Data Processing Service Organizations v. Camp*, 397 U.S. at 154 ("Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise.") (citation omitted); *State of Alaska v. Department of Transportation*, 868 F.2d 441, 444 (D.C. Cir. 1989); *Center for Auto Safety*, 793 F.2d at 1335 (Congress may, by legislation, expand standing to the full extent permitted by Article III, thus permitting litigation by one who otherwise would be barred by prudential standing rule, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE, Section 24:5, at 226 (2d ed. 1983).[13] It is clear then that appellants must be within the zone of interest of the statutes authorizing OMB Circular A-76, not OMB Circular A-76, itself.

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[13] Professor Davis explains:

> On the question whether Congress may determine who has standing, the relevant provision could be Article I, which confers upon Congress the power to create legal rights. *If Congress may confer rights upon a class of persons, Congress may also confer rights to be plaintiffs.*

4 K. DAVIS, *supra*, Section 24:5, at 226 (emphasis in original).

We are not faced with a congressional delegation to the Executive to promulgate regulations on standing. Thus we do not address whether Congress may delegate such authority to the Executive.

1. Budget and Accounting Act of 1921, as amended.

The first of the two statutes under which the OMB promulgated the Circular is the Budget and Accounting Act of 1921, as amended, 31 U.S.C. Section 101 *et seq.* ("1921 Act"). We have found nothing in the 1921 Act or its legislative history indicating that Congress contemplated in-house federal employees or federal employee labor unions as " '[a particular] class [of plaintiff] to be relied upon to challenge agency disregard of the law.' " *Clarke*, 479 U.S. at 399 (quoting *Block v. Community Nutrition Institution*, 467 U.S. 340, 347 (1984), other citation omitted, brackets in *Clarke*).[14] Moreover, we have found

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[14] Congress has amended the Act thirteen times since its original enactment:

- Budget and Accounting Procedures Act of 1950, Pub. L. No. 784, ch. 946, title I, pt. I, Sections 101, 102, 64 Stat. 832 (1950). *See* H.R. REP. NO. 2556, 81st Cong., 2d Sess. 1, *reprinted in* 1950 U.S. CODE CONG. & ADMIN. NEWS 3707, 3707 (an Act "to modernize and simplify governmental accounting and auditing methods and procedures");

- Act of July 28, 1953, Pub. L. No. 161, ch. 256, 67 Stat. 229 (1953) (to provide for a retirement annuity for the Comptroller General);

- Act of August 1, 1956, Pub. L. No. 863, ch. 814, Section 1, 70 Stat. 782 (1956) ("to improve governmental budgeting and accounting methods and procedures, and for other purposes"). *See also* S. REP. NO. 2265, 84th Cong., 2d Sess., 1956 U.S. CODE CONG. & ADMIN. NEWS 3794, 3794);

- Act of August 25, 1958, Pub. L. No. 85-759, Section 1, 70 Stat. 782 (1958) (an Act "to provide for

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sufficient support in the legislative history to conclude that the interests of in-house federal employees are in fact

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improved methods of stating budget estimates and estimates for deficiency and supplemental appropriations"). S. REP. NO. 1866, 85th Cong., 2d Sess. 1, *reprinted in*, 1958 U.S. CODE CONG. & ADMIN. NEWS 3917, 3917);

– Act of July 13, 1959, Pub. L. No. 86-87, 73 Stat. 197 (1959) (an Act providing for annuities to widows and children of Comptrollers General);

– Act of July 26, 1966, Pub. L. No. 89-520, Sections 1, 2, 80 Stat. 329 (1966) (an Act providing for retirement for Comptroller Generals);

– Legislative Reorganization Act of 1970, Pub. L. No. 91-510, title II, Section 221, 84 Stat. 1169 (1970). *See* H.R. REP. NO. 1215, 91st Cong., 2d Sess. 1, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4417, 4417-18, 4433-34 (an Act providing, *inter alia*, for improved rules and open proceedings of the Congress and granting the Comptroller General the authority "to review and analyze the results of Government programs and activities");

– Act of March 2, 1974, Pub. L. No. 93-250, Section 1, 88 Stat. 323, 324 (1974). *See* H.R. REP. NO. 697, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 2778, 2779 (to provide for the Director and Deputy Director of the Office of Management and Budget to be appointed by the President with the advice and consent of the Senate);

– Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, title VI, Sections 601-604, 88 Stat. 323, 324 (1974). *See* S. CONF. REP. NO. 924, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S.

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inconsistent with the animating purpose of the 1921 Act and, therefore, they are outside the Act's zone of interest. *Cf. id.*

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CODE CONG. & ADMIN. NEWS 3591, 3591 (an Act to assure congressional budget control, provide for the congressional determination of the appropriate level of federal revenues and expenditures, provide a system of impoundment control, establish national budget priorities, and provide for the furnishing of information to Congress by the Executive branch);

- Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. Rev. No. 94-210, title III, Section 311, 90 Stat. 60 (1976). *See* S. REP. NO. 499, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 14, 15 (an Act to promote revitalization of the railroad industry in the United States);

- Comptroller General Annuity Adjustment Act of 1978, Pub. L. No. 95-512, Sections 2-4, 92 Stat. 1799, 1800 (1978);

- General Accounting Office Act, Pub. L. No. 96-226, title I, Sections 102-104(b) (1), 94 Stat. 312-315 (1980). *See* S. REP. NO. 570, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 732, 732-33 (an Act to strengthen the GAO as the investigative and auditing arm of Congress and to improve budget management and expenditure control relating to the Comptroller General and the Inspector Generals of the Departments of Energy and Health and Human Services). The Act specifically amends the Budget and Accounting Act of 1921 to provide the GAO with sufficiently broad and comprehensive authority to investigate "all matters relating to the receipt and disbursement and application of public funds," *id.* at 2, U.S. CODE CONG. at 733; and,

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Generally, in the 1921 Act Congress sought to coordinate budgeting procedures and to increase efficiency in government operations after vast governmental growth during World War I. After the close of the War, the departments and agencies failed to relinquish authority which had enured to them during the War. Congress found departments and agencies duplicating services and decided to centralize the budgeting system under a single office in each of the two political branches.

Before enactment of the 1921 Act, each department or agency developed its own budget and submitted it to Congress, through the Secretary of the Treasury.[15] The President was never directly linked to this process.[16] The congressional committee overseeing that department or agency would authorize and appropriate that budget request. The total United States budget was never forecast;

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– Federal Managers' Financial Integrity Act of 1982, Pub. L. No. 97-255, Section 3, 96 Stat. 815 (1982). *See* H.R. REP. NO. 38, 97th Cong., 1st Sess. 1, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 1885, 1885-86 (an Act to improve government internal controls of each executive agency and to require ongoing evaluations and reports under OMB guidelines).

Nothing in these amendments or in their legislative history suggests that the interests of federal employees and federal labor unions are more than marginally related to the congressional purposes behind the 1921 Act. *Cf. Clarke*, 479 U.S. at 399.

[15] *See* 59 CONG. REC. 8626 (1920) (statement of Sen. Smoot) (debate on 1920 version of Act vetoed on other grounds by President Wilson; subject matter of 1921 Act substantially unchanged)

[16] *Id.*

thus it was easy for expenditures to exceed revenues because no single office was monitoring total expenditures. Additionally, each department and agency audited itself with no confirmation by outside auditors.

The 1921 Act established a two-pronged approach to this budgeting (or lack-of-budgeting) crisis. First, Congress created a Bureau of the Budget, the predecessor to the OMB, within, but quasi-independent of, the Department of the Treasury. The Bureau was to consolidate all independent budgets of departments and agencies of the United States government, eliminate duplication of services, and cut funding where services were no longer needed. The national budget of the Bureau, including an estimate of revenues for the next fiscal year, would then become the President's budget which the President submitted as one document to Congress for revision and approval.[17]

The second prong of the 1921 Act was the establishment of the General Accounting Office ("GAO") to represent the legislative interest in the budgeting process. The GAO was to be directed by a Comptroller General and Assistant Comptroller General effectively replacing the Comptroller of the Treasury. The Treasury Comptroller had been seriously hampered in effectively controlling Executive branch spending since he served at the pleasure of the President. The 1921 Act also transferred all the auditors from the various departments and agencies to GAO so that auditors would not be employed by the department they were auditing.

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[17] *See id.*

Congress considered these two separate offices, the Bureau and the GAO, one within each political branch, as a functional and valid constitutional "check and balance" over the expenditure of funds. Representative James W. Good of Iowa, the chief sponsor of the 1921 Act, and Chairman of both the House Committee on the Budget and the House Committee on Appropriations, stated:

> We provided for [a] system of *checks and balances* which ought to exist in every well-regulated budget plan. The President originates the budget and he transmits it to Congress. It is up to Congress to determine whether it will accept the estimates, whether it will modify them, reduce them, or enlarge them. Congress must then assume full responsibility for its acts, just as the President assumes responsibility for his when he makes the budget. After the bill has passed, then, under the execution of the law, we provide for that independent establishment in the general accounting office, *an office that will be to the appropriations made by Congress what the Supreme Court is to construction of laws that are enacted by Congress*. . . .
>
> We create this independent establishment [the GAO], answerable to Congress, an establishment that has clerks and accountants, who will go through every department of the Government. When they find waste and inefficiency, when they find duplication in the service, they will come to the committee of Congress that has jurisdiction of appropriations and report that fact. That fact will also be communicated to the President of the United States. *With that system of checks and balances* it is believed this great overlapping of activities, this duplication that exists in every department of the Government,

> will cease, and that the Government of the United States will be placed upon a business basis. . . .[18]

Throughout debate, Representative Good referred to the GAO as a "semijudicial" office, working directly for Congress to ensure that executive budgets and estimates are properly prepared.[19]

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[18] 59 CONG. REC. 7949 (1920) (statement of Rep. Good) (emphasis added) (debate on 1920 version; subject matter of 1921 Act substantially unchanged).

[19] *See, e.g.*, 59 CONG. REC. 8610 (1920) (debate on 1920 bill); 59 CONG. REC. 8733, 8737 (1920 App.) (extension of remarks). In 61 CONG. REC. 982 (1921) (debate on 1921 Act), Representative Good expressed the view that the 1921 Act

> provides . . . for well-regulated *checks and balances in the two departments*. It creates the office of the comptroller general, and he must audit all accounts. *We have created this office and have made it a semi-judicial one.*
>
> . . . [W]hen the committee from the bureau of the budget of the President's staff come and explain the budget, sitting right there, they are brought to face the comptroller general of the United States; and if a representative of the bureau of the budget states something that is not true, if he fails to state the whole truth, the comptroller general sits there with the Committee on Appropriations as an arm of Congress and can supply the desired information. In this way the facts will come before Congress in a way that we may eliminate duplications wherever we find them, and *where we find there is an excess of employees they can be eliminated*, and the service will not be injured by an injudicious cut in the appropriation.

(Emphasis added.)

Nothing in the legislative history of the 1921 Act suggests that Congress contemplated the protection of employment of federal employees. Indeed, Representative Good's presentation of the 1921 Act to the 67th Congress suggests a congressional purpose inconsistent with those interests. That is, the Act would require that some federal employees be terminated under the new budgeting process.

The director of the [Bureau of the Budget] must perform his work without fear or favor. He must do it with a realization that practically every Senator . . . will at some time or another be opposed to what he is doing. He must do it with a realization that at some time or another practically every Member of the House will oppose him. . . . Many [federal employee] offices must be abolished. *Some of the men who are here performing a public service must go home, and they will have to be sent home;* and when such an officeholder comes from your [congressional] district you will go down and see the [employee's superior] officer in [sic] behalf of the man from your district whom he is discharging, and Senators will go down, and they will make strong pleas showing how this man or that man who is slated to go has been a faithful public servant and why he should be permitted to remain.

When it comes to discharging these men who must be discharged, I say to you it is going to test the backbone in a man who has to do this work; it will try the fiber of the best man that the President can secure. . . . We ought not to throw upon the Secretary of the Treasury this duty. . . [because this]

> would simply create disturbance with the other members of the Cabinet whose organizations by such act he was attempting to regulate and control.[20]

While representative Good made this statement during debate on whether the Bureau of the Budget should be under the Department of the Treasury or directly under the Executive Office of the President,[21] his statements illustrate that Congress was aware that some federal employees would lose their jobs after the 1921 Act took effect. He does not hint of any remedy for the severed employees, or suggest that the employees may assert standing upon an act with which their interests are logically inconsistent. Good's statements support the inference to be drawn from the text of the Act. That is, although Congress was well aware that the reformation of the federal budgeting process would result in a loss of federal jobs, it afforded the discharged employees neither protection nor remedy. Thus, the 1921 Act is fundamentally inconsistent with the interests asserted by appellants, who, quite understandably complain that the

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[20] 61 CONG. REC. 981-82 (1921) (statement of Rep. Good) (debate on 1921 Act).

[21] The House desired an independent Bureau of the Budget whose director reported directly to the President, lest the director be unable to cut the budget of his superior agency, the Department of the Treasury. The Senate, fearing that the Secretary of Treasury would lose control over a substantial area of his responsibility, preferred the Bureau to be an office within the Treasury. A modest compromise was arranged where the Secretary of Treasury was a figurehead superior over the director of the Bureau.

challenged governmental conduct will cause an adverse impact to in-house employees.

Appellants may have many "interests," but for zone of interest purposes we must look to their particular interests, not to the interests amounting to generalized grievances of all citizens. *See ASARCO, Inc. v. Kadish*, ___ U.S. ___, 109 S. Ct. 2037 (1989); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983). The dissent contends that we proceed from an erroneous "fundamental premise that the employees cannot assert an interest in having the government conform to the law in making a contracting out decision." Dissent at 5. However, as we have previously held, " . . . to satisfy the zone of interests requirement, appellants must establish that their *particular* interest alleged to have been injured by the [alleged failure of the government to conform to a law] fall within the respective zones of interests intended to be protected or regulated by [that law]." *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 812 (D.C. Cir. 1987) (emphasis added).

As we noted in *Haitian Refugee Center*,

> [i]f any person or organization interested in promoting . . . protection of the rights created by a statute . . . has an interest that falls within the zone protected or regulated by the statute . . . , then the zone-of-interest test is not a test because it excludes nothing. Indeed, such a reading would mean that this court ignores the Supreme Court's decisions that persons who have only a "generalized grievance" about the way in which government operates do not have standing.

Id. at 813 (citing *Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974)).

Concededly, in *Haitian Refugee Center*, we conducted our zone of interest analysis without the benefit of the *Clarke* decision, but nothing in *Clarke* changes that analysis as it applied in *Haitian Refugee Center* or in the present case. Indeed, in our recent post-*Clarke* zone of interest decision, *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988) (per curiam) ("HWTC"), we expressly reapproved our prior understanding of the generalized grievance concept as taught in *Schlesinger and Haitian Refugee Center*. In HWTC, we expressly reiterated that neither individuals "with only a 'generalized grievance[]' " (citing *Schlesinger*) nor "an organization" formed "to advance [a generalized] grievance" (citing *Haitian Refugee Center*) has a sufficient interest to support standing. HWTC, 861 F.2d at 287. Thus, in HWTC, although we found that a trade association had standing as an organizational representative of the consumer environmental interest of a member company, we rejected standing to assert claims based solely on the status as representative of competitors of entities allegedly advantaged by the Environmental Protection Agency's failure adequately to perform a statutory duty. We did so, analyzing the standing question in light of *Clarke*, and expressly revivified *Haitian Refugee Center* stating "a rule that gave any such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing; any party with constitutional standing could sue." *Id.* at 283. *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104,

114-17 (1986) (holding that threatened loss from increased competition did not alone confer standing on a competitor to bring action under the Clayton Act to enjoin a proposed merger).

In HWTC, we recognized that the *Clarke* analysis of the zone of interest test " 'denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' " 861 F.2d at 283 (quoting *Clarke*, 107 S. Ct. at 757.) We thus found that the test now requires "less than a showing of congressional intent to benefit but more than a 'marginal[] rela[tionship]' to the statutory purposes." *Id.* (brackets in original).[22]

In the present case, the legislative history of the Budget and Accounting Act of 1921, as amended, leads us to conclude that Congress did not contemplate in-house federal employees and federal employee labor unions as plaintiffs. Congress carefully crafted a two-pronged checks and balances budgeting process to coordinate the United States budgeting process, eliminate duplication of services, and promote efficiency. Congress knew that some federal employees would be adversely affected and,

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[22] To be sure, as the dissent points out, we also held in HWTC that "[i]n the absence of apparent congressional intent to benefit, however, there may still be standing if some factor – some indicator that plaintiff is a peculiarly suitable challenger of administrative neglect – supports an inference that Congress would have intended eligibility." 861 F.2d at 283. We find no such factor in this case. We will discuss this question further in relation to alleged standing under the National Defense Authorization Act of 1987, *infra* IIA3.

instead of giving these employees some recourse, intentionally removed the director of the Bureau of the Budget from as much external pressure as possible so that he could make the "hard" decision to reduce the employee force where necessary. At most, federal employees' interests are marginally related to this centralized annual budgeting process balanced between the Executive and Legislative branches. *Cf. Clarke*, 479 U.S. at 399. It is more logical to conclude that federal employees' interests are "inconsistent." *Id.* Appellants alleged particular interest in the instant case is protection of the federal jobs of their members, not governmental efficiency as asserted by them. *See infra*.

If governmental efficiency was appellants' interest, then they would have no greater Article III injury in fact[23] than any taxpayer opposing a government appropriation. *See Flast v. Cohen*, 392 U.S. 82 (1968) (for a taxpayer to assert standing, the taxpayer must show that the challenged conduct violates a specific constitutional limitation imposed on the taxing and spending clause and does not merely exceed the general delegation of powers to Congress); *see also Bowen v. Kendrick*, 108 S. Ct. 2562, 2579 (1988) (referring to "*Flast* and the narrow exception it created to the general rule against taxpayer standing"); Ketler, *supra*, at 115-16 ("[F]ederal employees have no greater legal interest in or standing to assert allegations of government mismanagement [in the contracting out process] than do ordinary taxpayers."); *see generally, District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 3-4 (D.C. Cir. 1988).

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[23] *See supra* note 8.

2. The Office of Federal Procurement Policy Act Amendments of 1979.

In addition to the 1921 Act, OMB Circular A-76 cites as authority the Office of Federal Procurement Policy Act Amendments of 1979 ("OFPPAA"), as amended, 41 U.S.C. Sections 401-420. *See* OMB Circular A-76 para. 3, J.A. at 12. In 1974, Congress created the Office of Federal Procurement Policy[24] to implement recommendations of the Commission on Government Procurement to establish a central body "to provide overall direction of procurement policy for Federal executive agencies." H.R. REP. NO. 178, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1492, 1492. In OFPPAA, Congress amended and extended the life of this Office.

After a thorough review of the OFPPAA and its legislative history, we have found nothing to suggest a congressional purpose more than marginally related to the interests of federal employees vis-a-vis procurement policy. Throughout the legislative history of OFPPAA and its amendments, Congress emphasized economy and efficiency in government operations. Specifically regarding "contracting out," the Senate Committee on Governmental Affairs recognized that there had been a longstanding "executive branch policy of reliance on the private sector" to improve governmental efficiency as expressed in earlier versions of OMB Circular A-76. S. REP.

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[24] Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974).

NO. 144, 96th Cong., 1st Sess. 4 (1979). Congress specifically validated this Executive branch policy favoring the private sector in its enactment of the OFPPAA:

> The new [contracting out] policy is built on three principles:
>
> 1. Rely on the private sector. The Government's business is not to be in business. If private sources are available, they should be looked to first to provide the commercial or industrial services needed by the Government.
>
> 2. Retain certain governmental functions inhouse. Certain functions are inherently governmental in nature being so closely related to the public interest as to demand performance by Federal employees.
>
> 3. Aim for economy. Use cost comparison. When private performance is feasible and no overriding factors require in-house performance, the taxpayer deserves and expects the most economical performance and therefore rigorous comparison of contract cost versus inhouse cost should be used when appropriate to decide how the work will be done.

Id. See also H.R. REP. NO. 146, 98th Cong., 1st Sess. 8-9 (1983) (quoting the above "government[] policy on contracting out" and stating that "[t]hese are wise principles, and in their applicability to all agencies they are entirely consistent with the goal that the Federal procurement system be standardized."). The policy endorsed in the report does not merely favor the private sector; it endorses "reliance" on the private sector. The obvious presumption is that private sector performance is more economical and efficient. Only if the goods or services

required are "inherently governmental,"[25] as none of the services in question are, should the procuring agency look away from the private sector. The third principle's call for "rigorous comparison of contract cost versus in-house cost," read in the context of the whole policy, illustrates that Congress wanted in-house costs estimates to be strictly reviewed, so as not to frustrate the first principle's emphasis on the private sector.

Since the legislative history of the OFPPAA endorses the Executive branch policy of reliance on the private sector and the Circular finds authority in the OFPPAA, it is difficult to conclude anything but that the interests of federal employees are inconsistent with the purposes of OFPPAA. As previously discussed, appellants' real interest in this case is the protection of the federal jobs of its members, not efficiency in governmental operations. If appellants' real interest in this case was governmental efficiency, they might very well be within the zone of interest of the purposes of the OFPPAA. But again in the assertion of that interest of efficiency, they have no greater claim to standing than any taxpayers. *See* pp. 18-20 *supra*. Their real interest of job protection flies in the face of a policy that federal departments and agencies,

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[25] "A Governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees." OMB Circular A-76 para. 6.e., J.A. at 13. These include, *inter alia*, criminal investigations; the management of government programs; activities related to combat and combat support; the conduct of foreign relations; the regulations of natural resources; the direction of intelligence operations; and the regulation of industry and commerce. *Id.* para. 6.e.1.

through OMB Circular A-76, should rely on the private sector. Thus appellants' interests are inconsistent with the purposes of the OFPPAA and not within the zone of interest of that Act. *Cf. Clarke*, 479 U.S. at 399.

Because we hold that appellants' interests are not within the zone of interest of the Budget and Accounting Act of 1921 or the OFPPAA, the statutory authority for OMB Circular A-76, appellants may not assert standing based on those statutes.

3. National Defense Authorization Act of 1987.

Appellants also assert standing under section 1223(b) of the 1987 DoD Authorization Act, 10 U.S.C. Section 2304 note. That section requires the Secretary of Defense to "ensure that all costs considered [in a contracting out decision] . . . are realistic and fair." *See supra* note 6. Appellants contend that the legislative history of the Act, which prohibits contracting out of federal firefighter and DoD security guard positions, evidences congressional intent to provide employee standing because at least some government jobs are protected. Additionally they point out that advocates for federal employees defeated attempts by private contractors to eliminate built-in "bias" in the contracting out process favoring federal employees, such as the addition of a ten percent conversion differential which must be added to each contractor's bid. We find appellants' arguments unconvincing and, after reviewing the legislative history of section 1223(b), conclude that appellants' interest is inconsistent with the statutory requirement of a "realistic and fair" cost comparison.

From our review of the legislative history, the phrase "realistic and fair" was added to the Authorization Act to protect the private government contractor in the contracting out process against undue built-in "bias" favoring in-house performance of services. In fact, the phrase was added at the behest of government contractors in protest against the ten percent conversion differential. Appellees point to, and we find convincing, the following explanation of the "realistic and fair" language found in the Senate Report on the Authorization Act.

> Realistic and Fair Cost Comparisons
>
> DOD handicaps contractors' bidding on services and supplies during cost comparisons against retaining these functions in-house. In addition to the existing 10% [conversion] bias used to date, other handicaps are:
>
> * Contract Administration Cost – The cost for the government to administer the contract if awarded to a private concern is added to the vendor's bid.
>
> * Quality and Technical Assurance Cost – Quality and technical supervision and assurance are costs added to the vendor's bid when contracting out work.
>
> * Excessive liability coverage required and unrealistically low costs for government agencies.
>
> * Overhead costs computed for the government bid.
>
> Agency cost comparison must be made more equal for determination of contracting out. Some DOD organizations have used these handicaps to their advantage in determining the cost

> comparison outcome. In addition to opening the door for more competition, the competitions must be conducted on an "apples to apples" basis.

S. REP. NO. 331, 99th Cong., 2d Sess. 278, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6413, 6472. Thus the legislative history shows that the provision for a "realistic and fair" cost comparison was designed to protect the integrity of the contracting out process by resolving "handicaps" against government contractors – the apparent intended beneficiaries of section 1223(b).

Obedient to the teachings of *Clarke*, we must determine whether the interests of the in-house employees are only marginally related to or inconsistent with the purpose of the statute. *See Clarke*, 479 U.S. at 399. As discussed above, appellants' real interest in a decision to contract out is the protection of the jobs of their members. Private contractors competing to perform the same services that appellants' members now perform are the central threat to these government union members' jobs. The interests of the in-house federal employees are therefore "antithetical" to the interests of the private contractors because "federal employees present an 'either-or' situation in relation to private" contractors. *American Federation of Government Employees, Local 1668 v. Dunn*, 561 F.2d 1310, 1313 (9th Cir. 1977) (federal employees lack standing to contest a contracting out of an Air Force food service facility). Thus appellants' interest is inconsistent with the purpose of the section 1223(b) which provides for contracting out where that is the most cost-efficient alternative. It follows that appellants' interests are not

within the zone of interests of the Authorization Act of 1987.

As we noted in footnote 22, *supra*, the dissent correctly points out our holding in HWTC that "[i]n the absence of apparent congressional intent to benefit, however, there may still be standing if some factor – some indicator that plaintiff is a peculiarly suitable challenger of administrative neglect – supports an inference that Congress would have intended eligibility." 861 F.2d at 283. In the present case the dissent would find that "factor" in the absence of "another potential plaintiff." Dissent at p. 10. Assuming – and it is only an assumption[26] – that there is no other potential plaintiff, this is simply not the sort of "factor" necessary to confer standing. Indeed, the Supreme Court teaching is directly to the contrary. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. at 227 (citing *United States v. Richardson*, 418 U.S. at 179).

In *Schlesinger*, the Supreme Court actually indicated that the absence of other plaintiffs is not a relevant factor, rejecting "the District Court's observation that it was not irrelevant that if respondents could not obtain judicial review of petitioners' action, 'then as a practical matter no one can.' " 418 U.S. at 227. The Supreme Court went

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[26] The parties did not pursue this line of argument. Therefore, we are unable to hold with any degree of confidence that no such plaintiff lurks in the background, absent either a developed record or argument subjected to the searching light of adverse response.

on to state "[o]ur system of government leaves many crucial decisions to the political processes." *Id.*

Arguably, the discussion in *Schlesinger* occurred in the context of determining Article III rather than zone of interest standing,[27] but logically the same analysis applies in the zone of interest context of the present case. Indeed, we cited and relied on the *Schlesinger* analysis in our zone of interest decision in *Haitian Refugee Center*, 809 F.2d at 813, and HWTC, in turn, cites and relies on the relevant portion of *Haitian Refugee Center*, 861 F.2d at 283. The reasoning is equally applicable here. The interests of appellants in lawful and economic conduct of the contracting-out process is no more distinguishable from the interest of the citizenry-at-large than was the interest of the Reservist Committee in *Schlesinger* in preventing members of Congress from holding Reserve military commissions. Insofar as appellants assert an interest different from the citizenry-at-large, that interest – the protection of government employees whose job opportunities would be impaired because of contracting out – is close to the very bureaucratic interest, in expansion of government, that Congress sought to restrain in all of these statutes.[28]

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[27] However, the context of the *Schlesinger* opinion did not require a clean delineation between the two standing questions. The quoted language occurs in discussion concerning the standing of citizen *qua* citizen to represent an interest characterized by the Court "as 'undifferentiated' from that of all other citizens." 418 U.S. at 217. Therefore, the statement is at least arguably applicable in a zone of interest case on its own without further authority.

[28] Indeed, if the dissent were correct, any single employee of the Defense Department threatened with a job loss or

(Continued on following page)

Congress has indicated no intention to rely on the bureaucracy as a plaintiff class, and, indeed, all evidence is to the contrary. The bureaucratic interest functions internally, as it did in this case in the extensive review conducted by the Evaluation Board, the Administrative Appeals Review Board, and the General Accounting Office. *See supra*, pp. 3-5.

In this connection, we note that the dissent turns the "intent to rely" analysis on its head, stating that "the federal employees, and therefore the Union plaintiff here, do have standing unless the statutes or their legislative histories reveal a congressional intent to preclude reliance on this particular class of plaintiffs." Dissent at 10. But Supreme Court precedent requires an affirmative not a negative test: "the essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.' " *Clarke*, 479 U.S. at 399 (quoting *Block*, 467 U.S. at 347) (other citation omitted). Nothing in *Clarke* or any other authority cited by the dissent or the parties suggests that the assumed unavailability of other plaintiffs is any more relevant to the intent of Congress in the present context than it was to the determination of the lack of "citizen standing" in *Schlesinger*.

B. Disappointed Bidder Standing.

Lastly, appellants assert standing equivalent to that of a "disappointed bidder" in a government contract

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(Continued from previous page)

disadvantage by reason of departmental contracting out would have standing to sue.

solicitation and award. Since *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970), this Circuit has recognized that a disappointed bidder in a government contract award has standing under section 702 of the APA, 5 U.S.C. Section 702, to act as a " 'private attorney general,' " in order to "prevent[] the granting of [a] contract[] through arbitrary or capricious action" amounting to "illegal [agency] activity." 424 F.2d at 864. *See also National Maritime Union of America*, 824 F.2d at 1236-38; *Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 671-72 (D.C. Cir. 1987); *Delta Data Systems Corp. v. Webster*, 744 F.2d 197 (D.C. Cir. 1984). The disappointed bidder doctrine has since been recognized by most circuits[29] and Congress affirmatively recognized the doctrine in the

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[29] *See Choctaw Mfg. v. United States*, 761 F.2d 609 (11th Cir. 1985); *In re Smith & Wesson*, 757 F.2d 431 (1st Cir. 1985); *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1573-75 (Fed. Cir. 1983); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983); *Airco, Inc. v. Energy Research & Development Administration*, 528 F.2d 1294, 1296 (7th Cir. 1975) (per curiam); *Armstrong and Armstrong, Inc. v. United States*, 514 F.2d 402 (9th Cir. 1975); *Hayes International Corp. v. McLucas*, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975); *Merriam v. Kunzig*, 476 F.2d 1223, 1241-43 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973); *Keco Indus., Inc. v. United States*, 428 F.2d 1233, 1236-38 (Ct. Cl. 1970); *but see People's Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1193 n.7 (7th Cir. 1981) (questioning disappointed bidder standing in light of the zone of interest test); *Cincinnati Elec. Corp. v. Kleppe*, 509 F.2d 1080, 1086 (6th Cir. 1975) (contending that the *Clarke*-rejected requirement of congressional intent to benefit, *see Clarke*, 479 U.S. at 399-400 & n.15, is necessary for a party to assert APA standing in the "relevant statute").

legislative history of the Federal courts Improvement Act of 1982.[30]

We note that courts have applied disappointed bidder status to meet both Article III injury requirements[31]

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[30] Pub. L. No. 97-164, 96 Stat. 25 (1982) ("FCIA"). FCIA established the Claims Court which assumed the jurisdiction of the Court of Claims. Congress indicated an intent to retain the disappointed bidder or *Scanwell* doctrine. The Report of the House Committee on the Judiciary states:

> It is not the intent of the Committee to change existing caselaw as to the ability of parties to proceed in the district court pursuant to the Provisions of the Administrative Procedure Act in instances of illegal agency action. *See, e.g., Scanwell Laboratories, Inc. v. Shaffer*. . . . Therefore, . . . the Committee is satisfied by clothing the Claims Court with enlarged equitable powers not to the exclusion of the district courts.

H.R. REP. NO. 312, 97th Cong., 1st Sess. 43 (1981). The Report of the Senate Committee on the Judiciary agreed:

> By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process, the Committee does not intend to alter the current state of the substantive law in this area. Specifically the Scanwell doctrine as enunciated by the D.C. Circuit Court of appeals in 1970 is left in tact [sic].

S. REP. NO. 275, 97th Cong., 2d Sess. 22-23, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 33.

[31] *See, e.g., National Maritime*, 824 F.2d at 1237 ("Most of the cases . . . invoke [the disappointed bidder's] right as a means to resolve the zone-of-interest question . . . [b]ut we believe that [it] . . . is essential to article III standing in a procurement challenge.").

and zone of interest requirements.[32] This Circuit has considered "disappointed bidder" status as establishing the bidder's right to step into the shoes of the public and assert the public interest. In *Scanwell Laboratories*, Judge Tamm wrote for the Court:

> [T]here is no right in [the disappointed bidder] to have the contract awarded to it in the event the district court finds illegality in the award of the contract. . . . Thus the essential thrust of [the disappointed bidder's] claim on the merits is to satisfy the public interest in having agencies follow the regulations which control government contracting. The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."

Scanwell Laboratories, 424 F.2d at 864. More recently, now – Justice Scalia, while a member of our Court, restated this emphasis on the public interest: the "main objective" of the disappointed bidder doctrine is "to assure that the government obtains the most advantageous contract[] by complying with the procedures which Congress and applicable regulations have provided." *Delta Data Systems*, 744 F.2d at 206. *See also Orange Park Florida T.V.*, 811 F.2d at 672 ("[A] wrongful award of a government contract constitutes a discrete economic injury to unsuccessful bidders, who [then] have an incentive to vindicate the

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[32] *See, e.g., B.K. Instrument*, 715 F.2d at 719-20; *Control Data*, 655 F.2d at 293.

public interest as well as their own by insisting on the integrity of the procurement process.") (citations omitted).

While Judge Tamm's original language in *Scanwell Laboratories* is broadly phrased, apparently to include as a disappointed bidder anyone "who suffers injury as a result of the illegal activity," 424 F.2d at 864, a decade later he made it clear that disappointed bidder status is unavailable to those who "cannot claim the special relationship found . . . to exist between a bidder and the government; unlike the bidder in the context of a solicitation, they have not 'placed in the hands of the representatives of the government the power to bind [it] to a contract.' " *Control Data Corp. v. Baldrige*, 655 F.2d at 293 (quoting *Merriam v. Kunzig*, 476 F.2d at 1242 n.7. The government is obligated to provide the bidder under this special relationship with a "legally valid" and "fair procurement," *National Maritime*, 694 F.2d at 1237-38, which presumably fosters competition amongst contractors thereby benefiting the public interest. *See Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 842 (D.C. Cir. 1982). Not every bidder in a solicitation may assert disappointed bidder standing, otherwise nuisance suits could handicap the procurement system. Rather, standing is conferred only to those bidders who are " 'within the zone of active consideration' for the bid's award." *National Maritime*, 824 F.2d at 1237-38 n.12 (quoting *CACI, Inc.-Federal v. United States*, 719 F.2d at 1574-75, other citation omitted). *See also Morgan Business Assocs., Inc. v. United States*, 619 F.2d 892, 896 (Ct. Cl. 1980). Moreover, the special relationship ends once the solicitation and award

process is complete and the bidder has received his lawful and fair procurement. *See Gull Airborne Instruments*, 694 F.2d at 842-43 (disappointed bidder standing does not provide right to challenge contract administration).

Neither appellants nor their members bid on a contract and, thus, have *never* placed themselves in the special relationship by which the government can bind them to the bid. Moreover, with no bid on a solicitation, it is impossible for them to be within the zone of active consideration. Thus, we hold that appellants do not have disappointed bidder standing to contest the contracting out decision made by Fort Sill. As we stated in *National Maritime*, regarding an assertion of disappointed bidder standing by a union representing employees of an unsuccessful bidder, "the right is [the contractor's], not [the union's]." 824 F.2d at 1238.

III. CONCLUSION

For the above stated reasons, we find that appellants lacked standing to contest the Army's contracting out decision. We therefore find it unnecessary to determine whether administrative decisions to contract out are subject to judicial review.

Affirmed.

MIKVA, Circuit Judge, dissenting: Today this court finds that government employees who stand to lose their jobs as a result of what we must assume – at this stage – to be illegal contracting out decisions are not entitled to

raise their claim in court. This is not the first time that our circuit has attempted to restrict the standing of those who may sue under section 702 of the Administrative Procedure Act ("APA"). In a series of cases a few years ago, including *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981) and *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951 (D.C. Cir. 1982), this circuit created a demanding test for standing under section 702 using the same zone of interest rubric the majority employs again here. The test was far more difficult to meet than any promulgated by the Supreme Court itself and, not surprisingly, the Court specifically disapproved it two terms ago in *Clarke v. Securities Industry Association*, 479 U.S. 388, 400 n.15 (1987). This lesson is lost on the majority today, who pursue the same goal by only slightly different means, despite the Supreme Court's clear signals that the goal itself is inappropriate.

Originally, the zone of interest test for section 702 claims was adopted, in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), to enlarge, not restrict, the class entitled to protest administrative action. *See American Friends Service Committee v. Webster*, 720 F.2d 29, 49 (D.C. Cir. 1983). The Supreme Court has repeated loudly and clearly that courts are to welcome those pursuing grievances under the APA. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), the Court said that "the Administrative Procedure Act's generous review provisions must be given a hospitable interpretation" and that "only upon a showing of clear and convincing evidence of a contrary

legislative intent should the courts restrict access to judicial review" (internal quotations deleted). In *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970), the companion case to *Data Processing*, the Court cautioned that "preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred" and that "judicial review * * * will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." In its most recent opinion on the subject, the Court reiterated that while the zone of interest test is a gloss on section 702 and provides some limit to access, it "is not meant to be especially demanding," and there need only be "a plausible relationship" between the interest plaintiff asserts and the policies underlying the relevant statutory framework. *Clarke*, 479 U.S. at 396, 399, 403.

In the 19 years since the Court announced the zone of interest test for section 702 claims, it has yet to find any party before it outside that zone. It has only once found that plaintiffs, though within the zone of interests, were statutorily precluded from bringing suit, in *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984). *See also Clarke*, 479 U.S. at 400 (interpreting *Block* as finding preclusion). In *Block*, the Court found that granting standing for the plaintiffs would have permitted an end run around a carefully constructed administrative review procedure, enacted by Congress to resolve the same kind of complaint as plaintiffs brought, with only limited resort to the court system.

Nonetheless, the majority today has found a way to deny standing under section 702 to the plaintiff here. That the National Federation of Federal Employees ("NFFE") satisfies Article III's standing requirements is

scarcely in doubt. Its members have suffered substantial injury in fact. The Fort Sill contracting out decision led to the abolition of 401 positions. More than 200 employees were scheduled for discharge, 125 other for demotion. Nor is there a difficult question as to causality or redressability. Plaintiff's claim is that the Army artificially inflated the cost of the most efficient in-house performance of the Fort Sill functions and artificially deflated the cost of converting to using a private contractor, with the result that letting the contract to Northrup only appeared to be the least expensive means of getting the job done when actually in-house services were least expensive. If plaintiff is correct, the distortions certainly are causally related to the Army's decision to hire Northrup. If plaintiff could pursue this matter and prove all its claims, the Army decision *sub judice* would have to be vacated and the Army would be required to choose again the least expensive option, which would be shown to be the in-house services.

The majority neither acknowledges nor refutes this. Instead, it holds that the union and its members are not within the zone of interests of the Budget and Accounting Act of 1921 ("1921 Budget Act"), the Office of Federal Procurement Policy Act Amendments of 1979 ("OFPPAA"), or the 1987 Department of Defense Authorization Act ("1987 Authorization Act"). Its reasoning is as follows: (1) the federal employees' real interest is in keeping their jobs; (2) the statutes at issue do not indicate any congressional interest in maintaining or enlarging federal employment – they, in fact, show an interest in reducing employment when it can save money without sacrificing governmental needs; (3) the only way the employees can

assert an interest in enforcing the rules aimed at increasing government economy and efficiency is as taxpayers, and under *Flast v. Cohen*, 392 U.S. 82 (1968), no taxpayer standing is available to challenge these government actions.

The majority's claim – that NFFE's members are really only interested in keeping their jobs and that this interest is either marginally related to or inconsistent with Congress' purposes and that the members cannot assert an interest in enforcing the rules applying to contracting out decisions except as taxpayers – is wholly at odds with the Supreme Court's reasoning and decisions in its APA zone of interest cases.

The data processing companies, in the Court's first zone of interest case, were really only interested in keeping their profits, an interest certainly marginally related to Congress' purposes in enacting the banking laws, but the Court held that they had standing to enforce the banking laws' rules restricting bank activities. *Data Processing*, 397 U.S. at 156-58. Likewise, the travel agents in *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); the investment companies in *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) ("ICI"); and the discount brokers in *Clarke*, all interested solely in their bottom line, were permitted to assert the public interest in restricting bank activities.

In each of these cases, the Court understood plaintiffs' interest as a desire to hold on to their profits. *See Data Processing*, 397 U.S. at 152; *Arnold Tours*, 400 U.S. at 45; *ICI*, 401 U.S. at 620; *Clarke*, 479 U.S. at 403. In each of these cases, the Court neither found nor suggested that

such an interest was to be found among Congress' purposes in enacting the statute that the plaintiffs sued under. In *Data Processing*, the Court specifically distinguished *Flast* as irrelevant. *Flast*, it said, was a taxpayer suit, whereas this was a competitor's suit and the two "do not necessarily track one another." *Data Processing*, 397 U.S. at 152. Thus, the Court has repeatedly granted standing to plaintiffs whose actual motivation is marginally related to Congress' purposes, but whose asserted interest is consistent with them. *See Data Processing*, 397 U.S. at 156-58; *Arnold Tours*, 400 U.S. at 46-47; ICI, 401 U.S. at 620-21; *Clarke*, 479 U.S. at 403.

In the Supreme Court's most recent zone of interest case, *Clarke*, the Court made explicit what had been implicit in both *Data Processing* and *ICI*. "The Court's concern," it said of the *Data Processing* decision, "was to ensure that the data processors' association would be a reliable private attorney general to litigate the issues of the public interest * * *. [Although expressed in relation to Article III requirements,] the concern that the plaintiff be 'reliable' carries over the 'zone of interest' inquiry, which seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12 (some internal quotations deleted). *Clarke* explains that the Court in *ICI* did not take issue with the dissent's assertion that "there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks." *Clarke*, 479 U.S. at 398. The Court explained that "it was enough to provide standing that Congress,

for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business." *Id.*

The majority's argument is essentially that the court should look behind the plaintiff's asserted interest and consider its subjective interest. Under the majority's logic, a criminal defendant, in whose house or on whose person contraband is found, would not have standing to assert a fourth amendment claim because his "real" interest is in being free of all searches and seizures, not just unreasonable ones. That is not the law of standing and never has been.

Not surprisingly, the majority cites very little authority to support its fundamental premise that the employees cannot assert an interest in having the government conform to the law in making a contracting out decision. That which it does cite is either inapposite or without legal force. The two cases cited for the proposition that "for zone of interest purposes we must look to [plaintiffs'] personal interests, not to the interests amounting to generalized grievances of all citizens," *see* Majority Opinion ("Maj. Op.") at 20 n.22, are not even zone of interest cases. Nor are they opinions in which the court muses on the subject of how to approach zone of interest questions. They do not, in short, support in any way the proposition for which they are cited.

The first case, *ASARCO, Inc. v. Kadish*, ___ U.S. ___, 109 S. Ct. 2037 (1989), does contain a standing question: whether the state taxpayers or the teachers' association

who brought the suit meet Article III's standing requirements. But Article III standing is not the subject at issue in the majority's opinion. The majority expressly decline to address it. Maj. Op. at 6 n.8. Similarly, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), does not involve zone of interest questions, only an Article III one. The majority's further attempts to support its flawed premise include only a law review, and a handful of cases or parts of cases involving defects in Article III standing that do not address the question here: whether those claiming to be aggrieved under the APA are permitted to vindicate the public interest as private attorneys general. *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), involves an Article III question, causality, and a prudential third-party standing question. *United States v. Richardson*, 418 U.S. 166 (1974), is a taxpayer standing case. *Schlesinger v. Reservist Committee to Stop the War*, 418 U.S. 208 (1974), includes both citizen and taxpayer standing. None involve a zone of interest analysis. The majority asserts without explanation that assessing zone of interest standing follows "logically the same analysis" as determining Article III standing. *See* Maj. Op. at 28.

The questions, however, are altogether different. To have standing under Article III means to have "a personal stake in the outcome." *See Richardson*, 418 U.S. at 179. It means that the plaintiff's interest must be sufficiently concrete that he will be a determined, practical advocate. Thus, the Court bars a person with only a "generalized grievance," such as the plaintiff claiming citizen standing in *Schlesinger* or general taxpayer standing in *Richardson*. But, the federal employees suing here have as personal and concrete a stake as the framers of Article III could

have had in mind; they have lost their jobs. To be arguably within the zone of interests of a statute, on the other hand, means that Congress plausibly expected someone such as the plaintiffs to enforce its expressed statutory intentions – a wholly separate inquiry. When the Supreme Court in *Richardson* and *Schlesinger* says that it is irrelevant in determining standing that no one else would have standing either to bring the claim, it is saying that if unlawful behavior does not actually cause anyone any tangible harm, then Congress will have to be the overseer. *See Richardson*, 418 U.S. at 179. When the majority says that it is irrelevant to the zone of interest inquiry that no one else could have standing to bring a claim either, it is saying that Congress must be understood to be indifferent to whether its statutes are being complied with.

The zone of interest inquiry is at base an inquiry into Congress' intent. *See Block*, 467 U.S. at 347. Standing is permitted, as the majority explains at xx, to those whom Congress intended to be relied on to challenge agency disregard of the law. *Clarke*, 479 U.S. at 399. But how that intent is to be determined is explained by the Supreme Court in the same paragraph: there is a presumption of judicial review of agency action which is overcome when there is a fairly discernible congressional intent to preclude it. *Id.* Thus, it is the majority who have stood the "intent to rely" test on its head. *See* Maj. Op. at 29.

This circuit has recently had occasion to consider the precise question of how the Supreme Court's zone of interest decisions are to be parsed as they apply to plaintiffs whom Congress was not affirmatively trying to protect. In *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988) (*per curiam*), *cert. denied*, ___ U.S. ___

(1989) ("HWTC"), an association of hazardous waste control companies challenged the agency's rules as too lax. The companies' competitive injuries were that lax rules meant lower profits for them, as there would be fewer occasions when other companies would be required to hire their services. There was no claim that Congress enacted the environmental law to increase the companies' profits.

This court analyzed the Supreme Court's zone of interest decisions and concluded that: "In the absence of apparent congressional intent to benefit, however, there may still be standing if some factor – some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect – supports an inference that Congress would have intended eligibility." *Id.* at 283. This court read *Clarke*, *ICI*, and *Data Processing* as examples of this latter standing. *Id.* at 284. It explained:

> The [Supreme] Court may have inferred congressional approval of such challengers on the view that those whom Congress explicitly sought to benefit would make relatively unsuitable plaintiffs. For example, it is hard to picture a person or firm that could assert injury in the form of "the dangers of possible loss of public confidence in banks and the danger to the economy as a whole of speculation fueled by bank loans for investment purposes[.]"

HWTC, 861 F.2d at 284 (quoting *Clarke*, 479 U.S. at 398 n.13). In contrast, competitors suffer "sharp, clear losses" when banks invade forbidden territory. *Id.* at 284. This court then applied this analysis to HWTC. Because it specifically found that there were other identifiable potential plaintiffs, intended to be protected by Congress, who were "highly suitable champions of enforcement,"

this court concluded that there was no evidence of congressional intent to rely on HWTC and its members. *Id.*

HWTC's reading of the Supreme Court's zone of interest pronouncements is not only sensible and supportable, it is this circuit's own recent precedent. As such, it should be the approach applied to the case at bar by the majority. It would, however, yield the opposite result. There is no evidence that Congress intended to benefit federal employees when it passed at least two of the three statutes at issue, and ambiguous evidence as to the third. Thus the question, according to HWTC, is whether there is some factor – such as that federal employees are peculiarly suitable challengers of administrative misfeasance – that would support an inference that Congress would have intended that they have standing. That factor is present here.

The federal employees suffer "sharp, clear losses" whenever over-estimates of the cost of in-house performance of a government function or under-estimates of the cost of converting to private contractors results in selection of a more expensive choice to do the work than is available in-house. Though Congress has, in each of the statutes under which plaintiff claims standing, expressed a clear purpose favoring economy in the conduct of governmental affairs, no other parties are motivated to enforce any rules preventing this particular type of waste. The winning bidder can hardly be expected to challenge cost calculations when it has won. The losing bidders might sue if the winning bidder was given some advantage over them. They might also sue if the government under-estimated the cost of in-house performance or over-estimated the cost of converting to private contractors, but they have nothing to gain from errors in the opposite direction.

The only people who suffer loss if the government commits the type of errors alleged in this case, besides the employees, are taxpayers. Notwithstanding the majority's caution, it is not difficult to come to this conclusion. The only people affected when contracting out decisions are made are the federal employees, the agency, the winning bidder, private companies who either lost or would have competed but for some failure, and the people who foot the bill – the taxpayers. The agency cannot sue itself. All of the private companies – whether the winning bidder, the losing bidders, or potential competitors – are placed in an advantageous position when the government overestimates the in-house costs and therefore would not be able to allege the harm necessary to meet Article III standing requirements. Lastly, no taxpayer, as the majority has persuasively explained, would meet the personal stake requirement of Article III in order to sue on such a claim. The displaced federal employees, on the other hand, have been harmed, and, unlike HWTC, there is no one else eligible and motivated to enforce Congress' purpose.

Therefore, applying the law of standing consistently with Supreme Court and our own precedent, the federal employees, and therefore the union plaintiff here, do have standing unless the statutes or their legislative histories reveal a congressional intent to preclude reliance on this particular class of plaintiffs. *See Clarke*, 479 U.S. at 399. As HWTC indicates, the availability of another potential plaintiff whom Congress affirmatively sought to protect may defeat standing. In the only Supreme Court case – as well as in every post-*Clarke* D.C. Circuit case rejecting APA standing, another potential plaintiff was

found to be available. In *Block*, consumers challenged orders setting milk market orders (minimum prices paid to producers) on the ground that the prices were too high. The Court found that milk handlers were equally motivated to challenge high prices, and that Congress had contemplated that they would do so. *Block*, 467 U.S. at 346. In HWTC, this court found that the consumers of environmental purity were "highly suitable champions of enforcement." HWTC, 861 F.2d at 284. In *Water Transport Association v. ICC*, 819 F.2d 1189 (D.C. Cir. 1987), this court, in denying standing to water carriers, found that shippers and ports had standing to bring the same claim and were contemplated by Congress as the parties to be relied on in enforcing the provisions of the statute. *Id.* at 1190 n.6, 1192, 1195 n.48, 1197.

While the existence of an alternative plaintiff, affirmatively contemplated by Congress, may not always be sufficient ground to deny standing, *see International Ladies' Garment Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983), neither the Supreme Court nor this court (since *Clarke*) has denied APA standing when, as here, no alternative plaintiff can be found. In *Block*, the Supreme Court also emphasized another factor. It found that Congress had provided that the handlers were to first subject a price challenge to administrative review before suing in court and had prohibited injunctions in such suits. *Block*, 467 U.S. at 347-48. The Court explained that permitting consumers to sue directly would permit handlers, either as consumers or by joining forces, to manage an end run around both restrictions and that this showed that Congress did not intend consumers to have standing. *Id.* at 348. NFFE's standing in the case *sub judice* would not implicate this concern either; none of the three statutes

under which plaintiff claims standing include any limitations on judicial review that plaintiff's standing would circumvent.

The 1921 Budget Act was enacted to centralize the budget process and make it more economical. This is emphasized repeatedly in its legislative history. For example, its chief sponsor, Rep. James W. Good, said in describing the evil the law was intended to remedy: "We have been talking about economy in Government affairs, and at the same time have been practicing extravagance. * * * It will be necessary to adopt a system of economy and efficiency in every department, establishment, and bureau in order that the Government of the United States may obtain what it has never obtained before in all its history, and that is a dollar's worth of service, if possible, for every dollar expended." 61 Cong. Rec. 980 (1921). Thus, an action brought by NFFE to assure that the Army chooses to obtain needed services by the least expensive means is wholly consistent with Congress' purposes.

The majority contends that there is no evidence that Congress actually contemplated the "protection of employment of federal employees." Maj. Op. at 16. This, however, has no bearing on the question, as the Supreme Court has specifically noted that such affirmative evidence is unnecessary for a plaintiff to come within the zone of interests of a statute. *Clarke*, 479 U.S. at 399-400. The majority next points to two statements in the legislative history showing that Congress contemplated that some federal workers would be discharged as a result of efforts to eliminate duplication and waste, and that Congress would actively seek to eliminate "excess" employees when service would not be injured thereby. Maj. Op. at 16 n.19, 17-18. Again, this has no bearing on the

question of standing. Congress' interest in streamlining government and firing *unneeded* workers, is scarcely inconsistent with NFFE's suing to force the Army to choose the most cost-effective method of securing needed services. And there is no evidence in the legislative history of hostility to federal employees *per se* or to continued federal employment – as long as it is economical.

OFPPAA, like the 1921 Budget Act, was aimed at increasing the economy and efficiency of the federal government. The majority denies standing on the ground that the statute and its legislative history do not contain evidence that NFFE's interest is more than marginally related to Congress' purposes – again, implicitly applying the test disapproved in *Clarke*. Maj. Op. at 22. What makes NFFE's interest more than marginally related to Congress' purposes in enacting OFPPAA is not any explicit language in the statute or legislative history about federal employees; rather it is NFFE's unique ability to enforce Congress' clearly expressed interest in the government obtaining services at the lowest cost. *See* HWTC, 861 F.2d at 283.

The majority also denies standing under OFPPAA on the basis of a Senate Report which it says shows that Congress favored the private sector over federal employees, presumed "that private sector performance is more economical and efficient" and called for strict review of in-house costs. Maj. Op. at 23. The majority, however, is reading more into the report than is there. That report does indeed say that the OMB's contracting out policy is based on three principles: reliance on the private sector, retention of functions in-house which are "inherently

governmental in nature," and choosing the most economical approach after rigorous cost comparisons of contract versus in-house costs. S. Rep. No. 144, 96th Cong., 1st Sess. 4 (1979).

Nothing in the report, nor in the amendment Congress passed, however, evinces any interest in changing the contracting out system from one of absolute neutrality between federal employees and private contractors where the lowest bid wins, *see* OMB Circular A-76, to one which "favors" the private sector or presumes that the private sector is more economical and efficient. If Congress wanted to establish a presumption that the private sector is always more economical than government, why did it continue to permit time-consuming, lengthy cost comparisons before each and every contracting out decision? If Congress favored the private sector, why did it not require the government to use private enterprise for every function which is not "inherently governmental in nature"? The reason Congress acquiesced in OMB's provider-neutral decision-making strategy is that its interest was, first and last, in saving money – an interest which NFFE's suit is not only consistent with but promotes. Finally, neither the Senate report nor OFPPAA say anything at all about review of estimated costs, in-house or otherwise.

The 1987 Department of Defense Authorization Act was, like most authorization statutes, aimed at many things. Two sections are pertinent to this inquiry, section 1223 and section 1224. The majority's sole focus is on Section 1223(b), the 1987 Authorization Act provision under which NFFE is suing. This is inconsistent with Supreme Court precedent and results in a distorted view of Congress' intention toward contracting out. In *Data Processing*, the Court looked not only to the provision under which plaintiffs sued but also to a related although

wholly different act, passed decades later, to find that plaintiffs satisfied the zone of interest test. *See Data Processing*, 397 U.S. at 155-56. The Court again confirmed the appropriateness of interpreting the phrase "a relevant statute" in Section 702 broadly, for the purposes of the zone of interest test, in its most recent decision on the issue. *See Clarke*, 479 U.S. at 396-97.

Looking no further than the 1987 Authorization Act itself, but at the immediately surrounding provisions as well as the one plaintiff sues under, it is clear that Congress' stance throughout was neither consistently pro-federal employee nor pro-private contractor. The contracting out provisions were enacted under a section entitled "Economy and Efficiency." Pub. L. 99-661, 100 Stat. 3976. Congress' interest was in an economically run defense program and its statutory choices manifest a deliberate attempt to construct a purposeful balance among the interests involved. *Cf. Wilderness Society v. Griles*, 824 F.2d 4, 18 n.11 (D.C. Cir. 1987) (finding plaintiff within zone of interests of federal statutes because they were attempting to enforce the "purposeful balance" Congress had struck).

The legislative history cited by the majority is the Senate Report explaining the Senate's version of Section 1223(b). Maj. Op. at 25. The Senate committee, as the majority explains, called for "realistic and fair" cost comparisons because it believed that the Department of Defense ("DOD") was putting its thumb on the scale to maintain defense functions in-house. The Senate's version also made no mention of the ten percent differential that, under OMB rules, was added to any private contractor's bid to cover various hidden costs. In addition, the

Senate's version prohibited conversion of any commercial or industrial activity performed by a private contractor to performance in-house, excepting emergency conditions, unless the Secretary of Defense informed Congress first and provided it with a detailed five-year cost projection of the two alternatives.

Thus, the majority's detection of a pro-private contractor bias in the Senate committee's report is not without foundation, although even the Senate committee continued to call for DOD to choose the lowest cost alternative rather than insisting on private contractors wherever national security permitted. *See* S. Rep. 331, 99th Cong., 2d Sess. 277, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6413, 6472. However, the bill described by that Senate report did not pass in its entirety, and several of the changes worked in conference are instructive.

For example, section 1223(a), as enacted, requires the Secretary of Defense to procure supplies and services from the private sector *"if such a source can provide* such supply or service to the Department *at a cost that is lower (after including any cost differential required by law, executive order, or regulation) than the cost at which the Department can provide the same supply or service."* 1987 Authorization Act, Pub. L. 99-661, 100 Stat. 3977 (emphasis added). This language, in particular the insistence that prescribed cost differentials be added to private contractor bids before comparing them with in-house cost estimates, was added in conference. *See*. H.R. Conf. Rep. 1001, 99th Cong., 2d Sess. 526, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6413, 6585. It replaced section 1233 of the 1986 law that simply required the Secretary to ensure that private contractors are used when they would be cost effective and in the best interests of national security. *See id.*; Pub. L. 99-145, 99 Stat. 734. It may be debatable whether this

change manifests an intention to protect federal employees, as appellant argues, but it certainly shows that Congress had no preference for private contractors over federal employees, if the employees were the cheapest alternative. And it shows that Congress wanted to make sure that the scales could be tipped toward employees if this would better reflect real costs (or a policy decision).

The Senate's tough reconversion was also changed in conference. Instead ~~of~~ being prohibited from converting functions back in-house unless he submitted a five-year projected comparative cost study, the Secretary was left free to return functions from private contractor to government. Congress decided to require the Secretary only to maintain data comparing the projected cost of continuing the contract to the actual cost of in-house performance and to submit such data to Congress after the first and second six months after the change. *See* H.R. Conf. Rep. 1001, 99th Cong., 2d Sess. 527, *reprinted in* 1986 U.S. Code Cong. & Admin. News 6413, 6586; Pub. L. 99-661, Section 1224, 100 Stat. 3977-78. Again, while the initial Senate bill might have been interpreted as demonstrating a pro-private contractor bias, the statute as enacted shows that any such bias was eliminated before passage.

An earlier statute, in effect when the Fort Sill decision was made, sheds further light on Congress' purposes with regard to contracting out. It provided:

> (a) No commercial or industrial type function of the Department of Defense that on October 1, 1980, is being performed by Department of Defense civilian employees may be converted to performance by a private contractor –

(1) to circumvent any civilian personnel ceiling; or

(2) unless the Secretary of Defense provides to the Congress in a timely manner –

(A) notification of any decision to study such commercial or industrial type function for possible performance by a private contractor;

(B) a detailed summary of a *comparison of the cost of performance of such function by the Department of Defense civilian employees and by private contractor which demonstrates that the performance of such function by a private contractor will result in a cost savings to the Government over the life of the contract* and a certification that the entire cost comparison is available;

(C) a certification that *the Government calculation for the cost of performance of such function by Department of Defense civilian employees is based on an estimate of the most efficient and cost effective organization for performance of such function by Department of Defense civilian employees*; and

(D) a report, to be submitted with the certification required by subparagraph (C), showing –

(i) the potential economic effect on employees affected, and the potential economic effect on the local community and Federal Government if more than 50 employees are involved, of contracting for performance of such function; * * *

Pub. L. 96-342, tit. V, Section 502, 94 Stat. 1086 (1980), as amended by Pub. L. 97-252, tit. XI, Section 1112(a) (1982), 96 Stat. 747, *reprinted at* 10 U.S.C. Section 2304 note (emphasis added).

Understood in context, Congress' passage of Section 1223(b) indicates that the words "realistic and fair" were

meant literally. The Senate report makes it clear that the committee was concerned with abuses that favored in-house performance. But not only is there no indication that the Senate would have been indifferent to DOD abuses that favored private contractors, there is every indication – in both the 1987 Authorization Act as well as the 1980 one – that Congress as a whole intended to disfavor any abuse which rendered cost comparisons unreliable. Thus, NFFE's suit, which challenges such an allegedly unreliable cost comparison, promotes Congress' interest in choosing the most cost-effective supplier of DOD needs and is well within the zone of interests of the relevant statutory framework.

Only one circuit has addressed the question of whether federal employees have standing to challenge cost comparisons in contracting out decisions. *See American Federation of Government Employees' Local 1668 v. Dunn*, 561 F.2d 1310 (9th Cir. 1977) (involving the contracting out of an air force cafeteria). In *Dunn*, the Ninth Circuit decided that the union did not have standing to assert such a claim, but it decided this without examining the 1921 Budget Act or OFPPAA or any DOD Authorization Acts. The opinion summarily dismissed plaintiff's standing to challenge cost comparisons, "for the reasons set forth earlier in this opinion." *Dunn*, 561 F.2d at 1315. The only standing discussion earlier in the opinion was whether plaintiff had standing to bring a different claim under the Service Contract Act. The court found that plaintiff was not within the zone of interests of that act. *Id.* at 1313. But since NFFE is not suing under the Service Contract Act, and since the Ninth Circuit does not appear to have considered whether federal employees are within the zone of interests of the three statutes at issue here, I

fail to see what force the Ninth Circuit's decision can have on our analysis of the case before us.

Congress passed a law aimed at saving money. It established a procedure and standards for the Army to follow in seeking such savings. This court frustrates that laudable purpose by putting the procedures and standards beyond any judicial review. Because NFFE is the only party available to enforce an affirmative requirement that Congress has enacted and because nothing in any of the three statutes or their legislative histories indicates a Congressional intent to preclude NFFE's standing, I would find that NFFE satisfies the prudential requirements for standing to bring this suit, as well as the constitutional requirements. I would also find that the Army's decision to contract out the logistics work at Fort Sill is reviewable. The reviewability of OMB Circular A-76 is governed by our previous decisions. *See Equal Employment Opportunity Commission v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984) (deciding that OMB Circular A-76 was an "applicable law" within the meaning of 5 U.S.C. Section 7106(a)(2) and a "law, rule, or regulation" within the meaning of 5 U.S.C. Section 7103(a)(9)(C)(ii)), *cert. dismissed*, 476 U.S. 19 (1986); *Department of the Treasury v. FLRA*, 862 F.2d 880 (D.C. Cir. 1988) (same). Section 1223(b) of the 1987 Authorization Act should also be held to be reviewable, as its limitation, requiring cost comparisons to be "realistic and fair" – meaning accurate – is no less specific than the limitation found reviewable by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-13 (1971) (that statute prohibited use of parkland unless there was no "feasible and prudent alternative"). I would therefore reverse the decision below and remand for further proceedings.

Today's decision is a direct rebuff to the Supreme Court's Section 702 jurisprudence. Not content to have tried and failed, this circuit again attempts to prune the APA's broad grant of standing, with little regard for Congress' will and with insufficient attention to the Supreme Court's or its own precedent. The decision results in a no man's land with no review by anybody for important parts of two statutes and a regulation adopted pursuant to two others. Congress never signalled that it intended or desired such a bizarre outcome. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued December 22, 1989

No. 88-5271

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al.,

APPELLANTS

v.

RICHARD B. CHENEY, SECRETARY OF DEFENSE, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 88-00834)

On Appellants' Suggestion for Rehearing En Banc

Before: WALD, Chief Judge, MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, Circuit Judges.

ORDER

Appellants' Suggestion for Rehearing *En Banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

ROBERT A. BONNER
Deputy Clerk

Chief Judge WALD and Circuit Judges MIKVA and EDWARDS would grant the suggestion.

A statement of Circuit Judge D. H. GINSBURG, concurring in the denial of rehearing *en banc*, joined in by Circuit Judges SILBERMAN, WILLIAMS, and SENTELLE is attached.

A statement of Circuit Judge MIKVA, dissenting from the denial of rehearing *en banc*, joined in by Chief Judge WALD and Circuit Judge EDWARDS, is attached.

D. H. GINSBURG, Circuit Judge, concurring in the denial of rehearing *en banc*, with whom SILBERMAN, WILLIAMS, and SENTELLE, Circuit Judges, concur: Contrary to the claim made by petitioner National Federation of Federal Employees in urging the court to rehear this case *en banc*, there is no conflict between the decisions here and in *C C Distributors, Inc, v. United States*, 883 F.2d 146 (D.C. Cir. 1989), decided three days earlier. In *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989) (NFFE), we held that federal employees lack standing to challenge a decision to contract out government work because their interest is "inconsistent" with Congress's purpose, in Section 1223 of the 1987

National Defense Authorization Act, of removing unwarranted " 'handicaps' against government contractors," *id.* at 1050-51; in *C C Distributors* we held that private contractors have such standing because their interest in competing for government contracts is "closely related to" Congress's goal of improving efficiency through contracting out; as the legislative history showed, "DOD had previously handicapped private contractors" in ways that the Act was intended to preclude, 883 F.2d at 153. In applying the test for prudential standing, therefore, these decisions merely conclude that private contractors fall within, and federal employees without, "the zone of interests . . . protected or regulated by the statute . . . in question," *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (footnote omitted), i.e., Section 1223 of the 1987 Authorization Act.

As we discussed in *C C Distributors*, the Senate Report referred to that statute as a "mandatory contracting out provision" and stated that it would newly "enable private industry to compete with the government sector whenever possible. . . ." S. Rep. No. 331, 99th Cong. 277 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 6413, 6472. See *C C Distributors*, 883 F.2d at 152. On this basis, we found it reasonable to infer that Congress intended to permit the plaintiff contractors to bring a suit challenging the decision of the Air Force, without comparing the relative costs, to displace private contractors with in-house employees in order to perform certain procurement functions. *Id.* at 148-49. Although we did not expressly hold that private contractors were "intended beneficiaries" of the Act, *see Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 923 (D.C. Cir. 1989)

(HWTC IV), as they may well be, it was at least apparent that their interests systematically coincide with Congress's interest in encouraging contracting out. *See C C Distributors*, 883 F.2d at 153.

Congress mandated contracting out not as an end in itself, of course, but in order to promote economy and efficiency in government. *See id.* at 152-53. Economy and efficiency are promoted not through indiscriminate use of private contractors, but by contracting out only where that is less expensive than using in-house employees, such as are represented by NFFE. Thus, petitioners argue, the real interest of government employees in challenging contracting out decisions is consistent with Congress's intent, because the employees will prevail in getting the work only when they can make it cheaper for the Government to have them do the work.

The prudential standing test focuses not upon whether the outcome of a particular case might be consistent with the public interest, but upon whether furtherance of the challenger's interest is likely consistent with Congress's intent. *See* HWTC IV, 885 F.2d at 925-26. Adopting the level of generality suggested by petitioners would eviscerate the prudential standing test: challengers to agency actions might as reasonably assert that because Congress's interest in adopting any statute is to promote the public welfare, they have standing because they will not prevail unless their position is found to be consistent with the public welfare.

The prudential standing test is not so porous a filter. It screens out challenges by persons whom the court cannot rationally infer that "Congress 'intended . . . be

relied upon to challenge agency disregard of the law.' " *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987) (quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984)).

Here, we deal with a statute by which Congress expressed its intention to improve the relative position of private contractors, who had previously been handicapped by employees on the inside track. *See C C Distributors*, 883 F.2d at 152. Government employees were clearly not the intended beneficiaries of a statute designed to promote contracting out, nor are their interests systematically coincident with – on the contrary, they are systematically incongruent with – the objective of the statute. *See* HWTC IV, 885 F.2d at 924. Their suits therefore "are more likely to frustrate than to further," *Clarke*, 479 U.S. at 397 n.12, Congress's attempt to overcome the innate bias of government agencies against contracting out.

MIKVA, Circuit Judge, joined WALD, Chief Judge, and EDWARDS, Circuit Judge, dissenting from the denial of rehearing *en banc*: As I stated in my dissent in this case, I think the court has chosen to contravene the Supreme Court's clear teachings on prudential standing. As disturbing, it has twisted a congressional mandate to suit a purpose Congress never expressed.

I am genuinely perplexed by the majority's conclusion that the petitioners in this case lack prudential

standing. The Supreme Court has stated on several occasions that the zone-of-interest test denies standing to a prospective plaintiff *only* if that party's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987). The majority does not deny that this indisputably generous approach to prudential standing controls our decision. Yet, the court has turned a presumption in favor of judicial review into an almost irrebuttable presumption against such review.

The court acknowledges, as it must, that Congress' obvious intent to promote efficiency and economy is furthered only by contracting out when it is less expensive than using in-house employees. *See* Statement Concurring in Denial of Rehearing *En Banc* ("Conc. St.") at 3. Section 1223(a) of the National Defense Authorization Act for 1987 (the "Act") specifically requires the Secretary of Defense to obtain supplies and services from the private sector "if such a source can provide such supply or service to the department at a cost that is lower . . . than the cost at which the Department can provide the same supply or service." (emphasis added). Congress' mandate was not designed to give an unconditional preference to private contractors.

Obviously, allowing the petitioners to challenge contracting-out decisions provides a control rod that would further Congress' interest in the economical acquisition of supplies and services. The majority tacitly acknowledges this. Nonetheless, the court inexplicably transmutes this specific congressional purpose into a non-specific interest

in the public welfare. Conc. St. at 4. Having made this unjustified leap into the realm of "generalized grievance" with no effort to explain how it crossed the intervening chasm of credulity, the court has no trouble dismissing the petitioners' claim.

The court's warning that allowing petitioners standing would "eviscerate the prudential standing test," *id.*, rings hollow. Adopting the role of floodgate attendant, the court asserts that would-be plaintiffs could claim standing to challenge any agency action because Congress always legislates to serve the public welfare and such plaintiffs "will not prevail unless their position is found to be consistent with the public welfare." *Id.* This analogy is fundamentally flawed. Congress' specific interest in ensuring that goods and services are purchased by the government at the lowest possible cost cannot plausibly be equated with some undefined concern for the common good. Additionally, petitioners are the only parties whose interests would motivate them to challenge the agency's decision to contract out when in-house provision of goods and services is actually cheaper. *See NFFE. v. Cheney*, 883 F.2d 1038, 1058 (D.C. Cir. 1989) (Mikva, J., dissenting). Despite the majority's contrary – though unexplained – conclusion, the petitioners' unique position makes them "particularly suitable challenger[s] of administrative neglect . . . and supports an inference that Congress would have intended eligibility." *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 (D.C. Cir. 1988) (per curiam), *cert. denied*, 109 S. Ct. 3157 (1989).

The court's last assault on petitioners' claim of standing directly contravenes the Supreme Court's standing

jurisprudence. The court asserts that the Act was designed to improve the relative position of private contractors and, therefore, that the petitioners were clearly not Congress' intended beneficiaries. This basis for objecting to petitioners' standing is startling given the Supreme Court's teaching in *Clarke* that "[t]he [zone-of-interest] test is not meant to be especially demanding; in particular, *there need be no indication of Congressional purpose to benefit the would-be plaintiff.*" 479 U.S. at 400 (emphasis added). To the extent that the court has created an analog of "intended beneficiary" in its "systematic congruence of interests" requirement, *see* Conc. St. at 3, 5, it has assumed a course that has been proscribed by the Supreme Court.

In addition, the court sails into a theory of the legislative process that is unreal and unworldly. The court asserts conclusorily that the petitioners' interests are "systematically incongruent" with Congress' purpose in passing the Act. The majority seems to ascribe to Congress an unqualified intent to improve the position of private contractors, and assumes that this was the prime – nay, only – purpose of the Act. Congress almost never mandates a single class of "winners," inscribing all others in the "Book of Losers"; that is not the way the legislative process works. Here, as always, Congress satisfies its pluralistic responsibilities by balancing the interests at stake. Congress required the Secretary to choose private contractors only if these contractors could provide supplies or services at a lower cost than in-house employees. Allowing in-house employees to demonstrate lower-cost capability would infringe upon no benefit that Congress intended to confer upon private contractors. Indeed, it

would carry out the basic plan that Congress ordained, a plan that the majority has rewritten with a most perverse use of the standing doctrine.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, et al.,	)	
Plaintiffs,	)	Civil Action
v.	)	No. 88-834 (RCL)
FRANK C. CARLUCCI, SECRETARY OF DEFENSE, et al.,	)	
Defendants.	)	

ORDER

Based upon the reasons stated in open court, it is hereby ORDERED:

1. Defendants' Motion to Dismiss is GRANTED.

2. Plaintiffs' Motion for Preliminary Injunction is DENIED as moot.

Royce C. Lamberth
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, PLAINTIFF, -v- FRANK C. CARLUCCI, DEFENDANT.	Civil Action No. 88-834 Washington, D.C. Wednesday, August 10, 1988 5:00 p.m.

* *

EXCERPT
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff: Joshua F. Bowers, Esq.
Bruce P. Heppen, Esq.

For the Defendant: Nathan Dodell, Esq.

PROCEEDINGS

(The following is the Judge's ruling:)

THE COURT: Upon review of the motion to dismiss, the opposition thereto, the reply and the oral arguments of counsel, I have decided to take the approach followed by Judges Bryant and Gesell, and not take the safer course followed by Judge Oberdorfer, and let the Court of Appeals give me an opportunity to see and clarify the law once and for all.

So I have decided to grant the motion to dismiss. I believe that the matters are committed to unreviewable agency discretion as to the A-76 matter; that as to the Defense Authorization Act I don't think there are ascertainable standards or any law to apply, and the motion to dismiss will be granted on those grounds.

Because I don't want to have to get the case back if I am wrong on that, to reconsider the standing question and have that go up again before October 1st, I also am going to go ahead and reach the standing question so you can brief everything up there at one time. If I am wrong on these things, I will have to address the merits of the preliminary injunction before October 1st. The case has been reassigned to me since Judge Revercomb really hadn't invested anything in it. So it will be mine to do before October 1st.

So I will go ahead and decide the standing question. I don't think it's free from doubt but I will find that there is no standing. Although there is injury in fact, the plaintiffs are not within the zone of interest and do not meet the

zone of interest test as they are not the intended beneficiaries of the circular or of the Defense Authorization Act.

You know, I understand Judge Oberdorfer went at it the other way and went ahead and did reach the merits and didn't reach these questions. I think it's probably just as well to reach these questions and let the Court of Appeals tell us district judges what the law is. And if I am wrong, I am confident between now and October 1st I am going to have you before me again arguing all these other points about what the Army did under the circular.

I will grant the motion to dismiss, and therefore, the motion for preliminary injunction is denied, and on the basis of mootness, it is not necessary to reach it.

(End of excerpt)

National Defense Authorization Act
for Fiscal Year 1987

Pub. L. 99-661 Section 1223(b), 100 Stat 3977 (codified at 10 U.S.C. Section 2304 note (Supp V 1987); repealed by Pub. L. 100-370 Section 2(a)(1) (recodified at 10 U.S.C. Section 2462(b) (1988)

CONTRACTING OUT THE PERFORMANCE OF DEPARTMENT OF DEFENSE SUPPLY AND SERVICE FUNCTIONS

(a) In General. – Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower (after including any cost differential required by law, executive order, or regulation) than the cost at which the Department can provide the same supply or service.

(b) Cost Comparisons. – For the purpose of determining whether to contract with a source in the private sector for the performance of any Department of Defense function on the basis of a comparison of the costs of procuring supplies or services from such a source with the costs of providing the same supplies or services by the Department of Defense, the Secretary of Defense shall ensure that all costs considered, including the costs of

quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs, are realistic and fair.

OFFICE OF THE FEDERAL PROCUREMENT POLICY ACT AMENDMENTS OF 1979

Pub. L. 96-83, 93 Stat 648

DECLARATION OF POLICY

SEC. 2. It is declared to be the policy of Congress to promote economy, efficiency, and effectiveness in the procurement of property and services by and for the executive branch of the Federal Government by –

(1) promoting the use of full and open competition in the procurement of products and services;

(2) establishing policies, procedures, and practices which will require the Government to acquire property and services of the requisite quality and within the time needed at the lowest reasonable cost;

(3) improving the quality, efficiency, economy, and performance of Government procurement organizations and personnel, and eliminating fraud and waste in the procurement process;

(4) avoiding or eliminating unnecessary overlapping or duplication of procurement and related activities;

(5) avoiding or eliminating unnecessary or redundant requirements placed on contractor and Federal procurement officials;

(6) identifying gaps, omissions, or inconsistencies in procurement laws, regulations, and directives and in other laws, regulations, and directives, relating to or affecting procurement;

(7) achieving greater uniformity and simplicity, whenever appropriate, in procurement procedures;

(8) otherwise promoting economy, efficiency, and effectiveness in Government procurement organizations and operation;

(9) coordinating procurement policies and programs of the several departments and agencies;

(10) minimizing possible disruptive effects of Government procurement on particular industries, areas, or occupations;

(11) improving understanding of Government procurement laws and policies within the Government and by organizations and individuals doing business with the Government; and

(12) promoting fair dealing and equitable relationships among the parties in Government contracting.".

AUTHORITY AND FUNCTIONS

Pub. L. 96-83; 93 Stat 649

SEC. 6.(a) The Administrator shall provide overall leadership in the development and implementation of procurement policies and the coordination of programs to improve the quality and performance of procurement personnel. The Administrator shall develop for submission under section 8(a) a uniform procurement system which shall, to the extent he considers appropriate and with due regard to the program activities of the executive agencies, include uniform policies, regulations, procedures, and forms to be followed by executive agencies –

(1) in the procurement of –

(A) property other than real property in being;

(B) services, including research and development; and

(C) construction, alteration, repair, or maintenance of real property; and

(2) in providing for procurement by recipients of Federal grants or assistance of items specified in clauses (1)(A), (1)(B), and (1)(C) of this subsection, to the extent required for performance of Federal grant or assistance programs.".

Federal Acquisition Regulation
48 CFR Chapter 1, Subpart 7.3 (1988)
Contractor Versus Government Performance

7.300 Scope of subpart.

This subpart prescribes policies and procedures for use in acquisitions of commercial or industrial products and services subject to (a) OMB Circular No. A-76 (the Circular), Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government, and (b) the Cost Comparison Handbook (the Handbook). Supplement No. 1 to OMB Circular No. A-76.

7.301 Policy.

The Circular provides that it is the policy of the Government to (a) rely generally on private commercial sources for supplies and services, if certain criteria are met, while recognizing that some functions are inherently Governmental and must be performed by Government personnel, and (b) give appropriate consideration to relative cost in deciding between Government performance and performance under contract. In comparing the costs of Government and contractor performance, the Circular provides that agencies shall base the contractor's cost of performance on firm offers.

7.302 General.

The Circular and the Handbook –

(a) Prescribe the overall policies and detailed procedures required of all agencies in making cost comparisons between contractor and Government performance. In making cost comparisons, agencies shall –

(1) Prepare an estimate of the cost of Government performance based on the same work statement and level of performance as apply to offerors; and

(2) Compare the total cost of Government performance to the total cost of contracting with the potentially successful offeror.

(b) Provide that solicitations and synopses of the solicitations issued to obtain offers for comparison purposes shall state that they will not result in a contract if Government performance is determined to be more advantageous (*see* the solicitation provisions at 52.207-1 and 52.207-2);

(c) Provide that each cost comparison shall be reviewed by an activity independent of the activity which prepared the cost analysis to ensure conformance with the instructions in the Handbook; and

(d) Provide that, ordinarily, agencies should not incur the delay and expense of conducting cost comparison studies to justify a Government commercial or industrial activity involving 10 or fewer full-time equivalents as defined in OMB Circular No. A-76. Activities below this threshold should be performed by contract unless in-house performance is justified. However, if there is reason to believe that inadequate competition or other factors are causing commercial prices to be unreasonable, a cost comparison study may be conducted.

[50 FR 35475, Aug. 30, 1985, as amended at 53 FR 17856, May 18, 1988]

7.307 Appeals.

(a) The Circular provides that each agency shall establish an appeals procedure for informal administrative review of the initial cost-comparison result. The appeals procedure shall provide for an independent, objective review of the initial result by an official at the same level as, or at a higher level than, the official who approved that result. This review must be completed within 30 days after the contracting officer receives a request under paragraph (b) below. The purpose is to protect the rights of affected parties and to ensure that final agency determinations are fair, equitable, and in accordance with established policy.

(b) The Circular provides that the appeals procedure shall be used only to resolve questions concerning the calculation of the cost comparison and shall not apply to questions concerning selection of one contractor in preference to another, which shall be treated as prescribed in 14.407-8, Protests against award. Directly affected parties may request review of any discrepancy in the cost comparison. Any such requests shall be made in writing to the contracting officer, who shall forward them in accordance with agency procedures. Such requests shall be considered only if based on specific objections and received within the public review period stated in the solicitation.

EXECUTIVE ORDER NO. 12615
Nov. 19, 1987, 52 F.R. 44853
reprinted in 31 U.S.C. Section 501 (Pocket Part, 1989)

PERFORMANCE OF FEDERAL GOVERNMENT COMMERCIAL ACTIVITIES BY PRIVATE SECTOR

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to facilitate ongoing efforts to ensure that the Federal Government acquires needed goods and services in the most economical and efficient manner, it is hereby ordered as follows:

Section 1. The head of each Executive department and agency shall, to the extent permitted by law:

(a) Ensure that new Federal Government requirements for commercial activities are provided by private industry, except where statute or national security requires government performance or where private industry costs are unreasonable.

(b) Identify by April 29, 1988, in cooperation with the Director of the Office of Management and Budget all commercial activities currently performed by government. The department and agency heads are encouraged to consult with the President's Commission on Privatization in making such identification;

(c) Schedule, by June 30, 1988, all commercial activities identified pursuant to subsection (b) for study in accordance with the procedures of OMB Circular No. A-76, as revised, and the Supplement thereto, to determine whether they could be performed more economically by private industry;

(d) Meet the study goals for Fiscal Year 1988 set forth in "Management of the United States Government, Fiscal Year 1988"; and thereafter, beginning with Fiscal Year 1989, conduct annual studies of not less than 3 percent of the department or agency's total civilian population, until all identified potential commercial activities have been studied;

(e) Include in each annual budget proposal to the Office of Management and Budget estimates of expected yearly budget savings from the privatization of commercial activities projected to be accomplished following the completion of scheduled studies, unless an exception is authorized by the Director of the Office of Management and Budget. These estimates shall be based on analysis of savings under previous studies and estimated savings to be achieved from future conversions to contract. A department or agency proposal may reflect retention of expected first-year savings as negotiated with the Office of Management and Budget for use as incentive compensation to reward employees covered by the studies for their productivity efforts, or for use in other productivity enhancement projects;

(f) Develop and maintain an effective job placement program for government employees affected by privatization initiatives and cooperate fully in interagency placement efforts;

(g) Designate a senior-level official to coordinate the OMB Circular No. A-76 studies and other privatization efforts; and

(h) Report to the President on progress each quarter, through the Director of the Office of Management and Budget.

Sec. 2. The Director of the Office of Management and Budget shall, to the extent permitted by law:

(a) Issue guidance to departments and agencies to implement this Order. Such guidance shall be designed to ensure an equitable cost comparison of government-operated commercial activities with private industry performance of the same activities, and to improve the efficiency in the conduct of studies;

(b) Publish for public review (i) not later than 30 days after its completion, the inventory of commercial activities identified pursuant to section 1(b) and the activities scheduled for study by departments and agencies in Fiscal Year 1988 pursuant to section 1(c); and (ii) not later than 30 days before the start of each successive fiscal year, the list of activities to be reviewed during that year pursuant to section 1(d); and

(c) Establish a tracking system to monitor, on a quarterly basis, progress by departments and agencies in carrying out this Order.

Sec. 3. The Director of the Office of Personnel Management, in consultation with the heads of other Executive departments and agencies, shall review and revise, as necessary and to the extent permitted by law, personnel policies and regulations in order (a) to ensure that government managers have the flexibility to organize in the most effective and efficient manner to achieve levels of productivity comparable with those of private industry,

and (b) to reduce any adverse effects of productivity improvements on employees.

Sec. 4. For purposes of this Order, the terms "commercial activity," "conversion to contract," and "cost comparison" shall have the meanings set forth in OMB Circular No. A-76, as revised.

Sec. 5. Nothing in this Order shall be construed to confer a private right of action on any person, or to add in any way to applicable procurement procedures required by existing law.

RONALD REAGAN